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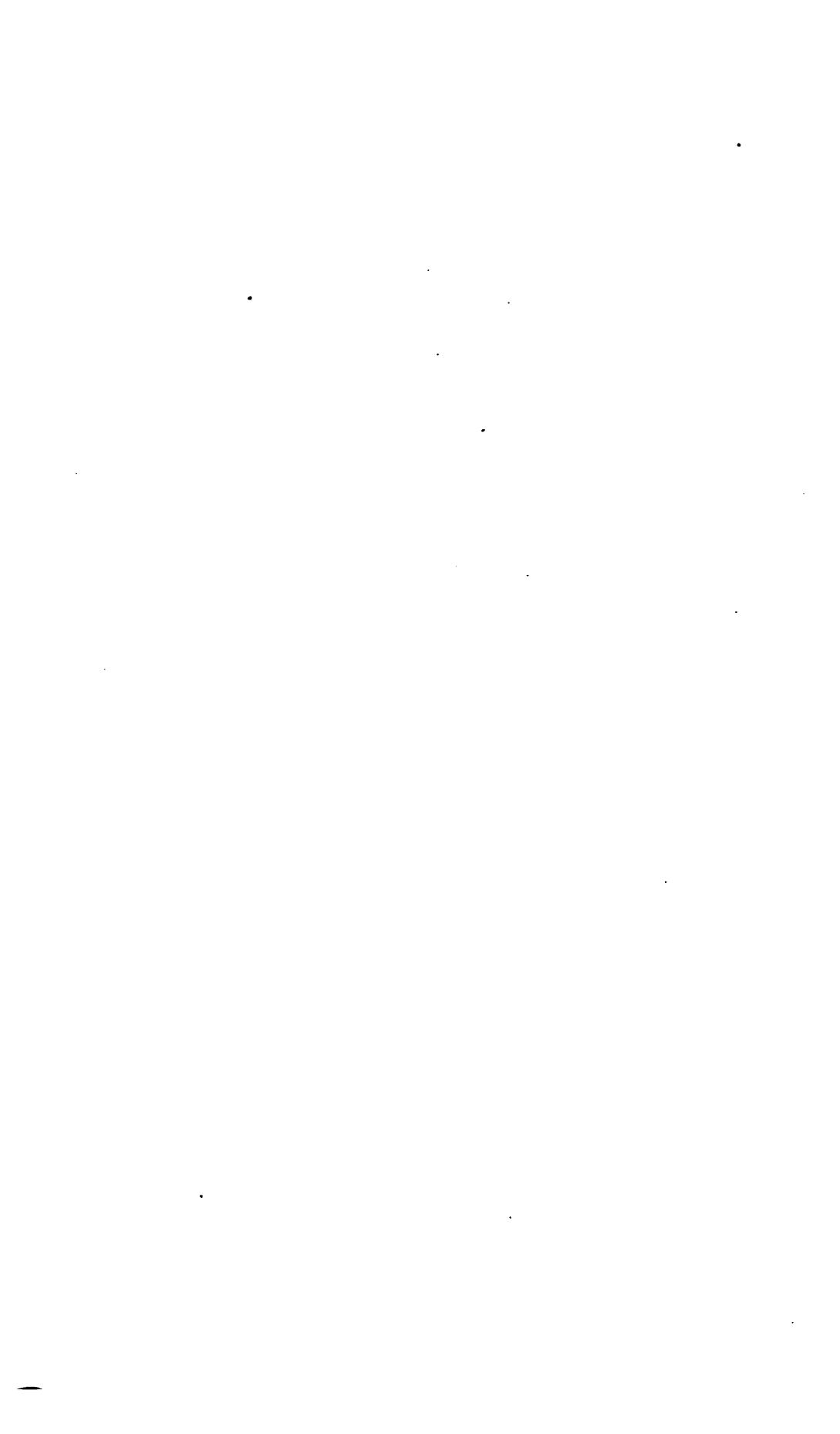
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A
TREATISE
OF THE
LAW OF TITHES;
W. W. W.

A
TREATISE
OF THE
LAW OF TITHES;

COMPILED IN PART
FROM SOME NOTES
OF
RICHARD WOODDESON, Esq. D. C. L.

BY SAMUEL TOLLER, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

Ornari res ipsa negat, contenta doceri.

MANID.

LONDON:

PRINTED BY A. STRAHAN,
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1808.

ADVERTISEMENT.

WHATEVER difference of sentiment may exist in respect to the policy of the Law of Tithes, and the expedience of establishing that species of provision for the clergy, yet as it constitutes, and has so long constituted an important part of the Laws of England, an attempt to methodise and to explain it, to disentangle its difficulties, and to illustrate its obscurity, can by no party be regarded with disapprobation. This task it has been the object of the following treatise to perform. Dr. Wooddeson having collected a variety of notes with a view to extend and to prepare them for a publication upon the subject, was compelled by an ill state of health to relinquish his purpose, before it was much more than half accomplished, and he did me the honour of communicating to me his papers, with a request that I would revise them, and complete the work. Encouraged by the confidence reposed in me by my learned friend, I ventured to comply with his application,

plication, and beg leave to submit to the public the result of our joint labours, trusting that the arduous nature of the undertaking will be deemed some apology for the imperfections which may be discovered in its execution.

SAMUEL TOLLER.

Lincoln's Inn,
October 15th, 1808.

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THE LAW OF TITHES.

CHAPTER THE FIRST.

HISTORICAL INTRODUCTION.

§ I. *Tithes before their legal Establishment.*

WITHIN (a) the period which elapsed between the latter end of the fourth century, and the commencement of the reign of Charlemagne, comprehending a space of about four hundred years, the payment of tithes or tenths of the produce of lands, and of other articles, was inculcated as a religious duty by some eminent fathers of the church, and ministers of the gospel; and their preaching was not ineffectual.

But the offerings consequent on these admonitions seem not to have been always in the precise proportion of a tenth, and they were chiefly voluntary, and the effect of conscientious piety, except that where no contributions at all, or such as were illusory only, were rendered, the Church might on some occasions excommunicate, or censure the defaulters. The

(a) Seld. on Tithes c. v. § 1. & c. vi. Montefq. Sp. of L. b. xxxi. c. 12.

payments were in a great measure arbitrary also in respect to the persons to whom they were made; being sometimes to the priest officiating at the sacraments; sometimes to the superior of a religious conclave; sometimes to the bishop; and sometimes dedicated to the poor. And it appears moreover, that a perpetual or permanent right to tithes was very early consecrated to some churches by assignment out of particular lands at the owners pleasure. But the establishment had not yet acquired the sanction of public authority; nor of any ordinance in general force, ecclesiastical or civil. There are no traces of any law for tithes in the Eastern empire, at any period. And as to the Western church, in the age I am speaking of, the only ordinance (*b*) of undoubted credit for payment of them is that of the council of French bishops assembled at Macon so early as the year 586. But the decrees of that assembly were never received as general canons, nor did they obtain any great or lasting validity in the district in which they were enacted. Such was the origin of tithes as not yet recognised by secular authority, and thus they existed before the age of Charlemagne.

§ II. Tithes established on the Continent of Europe.

TO this powerful monarch, whose dominions were so wide and flourishing, are commonly ascribed the first general laws, certainly the earliest extant, for the payment of tithes. In a general assembly of estates spiritual and temporal held under him in the year 778, about twenty-two years before his title of emperor, it was ordained "*ut unusquisque suam decimam donet; atque per jussionem episcopi sui dispensetur.*" The indefinite expression, "*suam decimam,*" intimates, that the

(*b*) Gwill. Rep. 488. Seld. c. v. § 5. and Linden, 674.

custom of tithing was to a sufficient degree extensive, and prevalent to ascertain in some measure the subject matter of the offerings. This law is found among the *leges Longobardorum*, book iii. tit. 3. the whole title being inscribed *de decimis* (a). And it is also admitted in the capitulary of the emperors Charlemagne and Lewis, both of which collections are parts of the *Codex legum antiquarum*, edited by Lindembrock, where many statutes and ordinances concerning tithes occur. But it appears in point of fact that the establishment met with some opposition, of which the frequency, and solemnity of the injunction, afford a strong presumption. Thus in one (c) of them the duty is said to be confirmed, "*ex utriusque testamenti tabulis.*" Some are interspersed promiscuously among other Mosaical precepts, adopting the expressions of the Pentateuch; and one law inflicts on a person making default, the heavy penalty of forfeiture of his estate in the lands from which the tithes arose, and such estate or interest was at first usually granted for the feudatory's life, and then called (as in the text referred to) *beneficium*. In that passage, as in many other places, of these old institutions, *nonæ et decimæ* are mentioned together. This might lead to a supposition, that in some districts a greater proportion than a tenth was customarily paid; but Selden (d) in his profound learning and judgment interprets the *nonæ* to have a signification wholly distinct from the common use of *decimæ*, and to mean the rents or returns reserved on demising lands of the church.

Various authors have adverted to Charlemagne's fourfold distribution of tithes taken, as it seems, from antecedent canons (e), and the usage of primitive Christianity, viz. "*ut decimæ (f) populi in quatuor partes dividantur: Prima pars*

(a) Linden, 674.

(c) Linden, 1101. Seld. c. vi. f. 3.

(e) Linden, 703, 986, 987, 949.

(f) Linden, 674.

(d) Seld. c. vi. f. 7.

§ III. *Tithes in England.*

IN respect to the payment of tithes in this island, sir William Blackstone says, (o) “ possibly they were contemporary with “ the planting of christianity among the Saxons by Augustin “ the monk about the end of the sixth century.” If the only ground for this surmise is, that the payment was commonly urged, and inculcated from scriptural texts, and as consonant to the divine code, then it may with equal probability be referred to a much earlier period than that monk’s mission from Gregory the Great; for christianity prevailed in general among the Britons, and many ecclesiastical synods were holden here anterior to the Saxon dynasty. It may be remarked, that Augustin (p) inquiring of the pope, as to the bishop’s portion of the oblations of the faithful at the altar, makes no mention of tithes by name. He receives for answer that the custom is generally to make that quadripartite division before alluded to, which thus appears to be not only more antient than the law of Charlemagne on the subject, but (q) conformable also to some very old canon or usage: and this strengthens the former hypothesis concerning the original nature of tithes. In those elder ages, the bishop and his clergy (forming a council or chapter to him) resided together (except such as were sent to minister at a distance), and were in some measure maintained by such pious indefinite offerings without any local limits being ascertained, within which tithes were peculiarly demandable.

The (r) next mission from Rome after that of Augustin was in the year 786, when pope Hadrian the first sent

(o) 2 Bl. Com. 25.

(f) Seld. c. ix. § 2.

(q) Seld. c. vi. § 3. cites, Concil. Antioch. Gwill. Rep. 488.

(r) Seld. c. viii. § 2.

hither Gregory bishop of Ostia, and Theophylact bishop of Todi, for the reformation and establishment of the ecclesiastical code. Accordingly, distinct councils were assembled of the spiritual, and secular powers for the kingdoms of Northumberland and Mercia, the latter of which meetings seems also to have been attended by the states of Wessex, as well as the archbishop of Canterbury, et cæteris episcopis regionum. These ecclesiastical legislators readily embraced and adopted whatever was proposed by the authority and sanction of the legates, and among the rest an ordinance *de decimis dandis*; and thus the payment of tithes became the law of the land throughout the whole, or by far the greater part of the dominions of the Saxon heptarchy, not long after this event consolidated into the monarchy of England. In the succeeding ages frequent mention is made of tithes among the Anglo-Saxon laws: but the first peremptory limitation of them to one church in exclusion of others (other than by endowment) is in the laws (1) of king Edgar about the year 970, by which it was ordained that every man not having erected a church of his own should pay his tithes to the ealban mýnstræ, antient minister, (meaning, as the case might be, cathedral, mother church, or monastery), where he heard divine service. The same regard to the more antient places of worship is paid in a constitution (2) enacted about forty years afterwards, under Etheldred the second. But it is to be observed, that the ordinances of king Edgar point to the confirmed and (3) encreasing practice of thanes and great men, who, as religion prevailed, for the convenience of their families and tenants, erected and endowed churches within their respective feignories and domains; the boundaries of which in future determined the officiating minister's function and his emoluments, and such beneficed incumbent had no longer any claim on the com-

(1) Seld. c. viii. § 9. & c. ix.

(2) Seld. c. viii. § 10.

(3) Seld. c. ix. § 4.

mon stock of tithes and oblations in the treasury of the diocese. King Edgar's statutes, indeed, confine such endowments of newly erected and consecrated churches, having places of sepulture annexed to them, to one third only of the founder's tithes. But it is with reason supposed that these divisions or districts were soon considered as parishes of themselves, (rites (v) of sepulture being an old characteristic of (w) a parish church), and in process of time, perhaps speedily, attracted the two reserved thirds, to which the elder or mother church had once a claim. And I should conjecture, that this rarely happened to the prejudice of another *parish* church, in the sense we now use the term (x) (for *paræcia* or *parochia* was originally, and for a long time synonymous with diocese or bishopric; but rather to the diminution of the revenues of some episcopal see or monastery, which were reciprocally relieved by having fewer officiating clergy to support. The bishop's consent was necessary to the consecration of the new church; he could therefore have no ground for complaint. Many waste and uninhabited spots, not therefore attached to any parish, as they afterwards became cultivated, built upon, and populous, required a resident priest, and were enabled to render him temporal remuneration. Moreover, in places avowedly parochial, it is thought (y) that long after king Edgar's time tithes were demanded as due by prescription, or by special consecration of them to the incumbent's benefice, and merely of common right as at present and as annexed to

(v) 1 Vin. Lect. 314. 2 Inst. 363. seu diocesim, &c. Decretal Greg IX.

(w) See 2. R. A. 291.

c. 111. t. 30. c. 20. de parochiâ

(x) Seld. c. vi. § 3. & c. ix. § 3.

unius episcopi in diocesim alterius.

Lexic. var. Παροικία. Filescus in his Paræcia, c. i. calls parochia the popular and corrupt, and paræcia the true orthography, and says, canon decimus quartus apostolorum denuntiat episcopo suam descrenti Παροικίαν

Gwill. Rep. 488. aliquando parochia pro diocesi ponitur. Diocesis interdum pro parochiâ. Rebuffi tract. de decimis quæst vi. § 6. See also 5 Co. 67 a.

(y) Seld. c. ix. § 3.

the spiritual care of the parishioners resident within the limits. I should therefore ascribe the erection of the greater number of our comparatively more modern parishes to places where no tithes were before payable to any parochial benefice. And these observations collectively may account for the establishment of the incumbent's peculiar and exclusive right to tithes in his parochial limits of recent foundation, without traces found of any controversy in any of the many districts in which these new endowments successively took effect for more than a century downwards from the Norman invasion. Inasmuch that in (z) an epistle from king John to pope Innocent the third, it is claimed as (a) lawful by the custom of the realm for the bishops, earls, and barons to found churches within their feignories. The right is claimed generally, but the recognition of it, as allowed to laymen, is subject to provisos, that the bishop's assent be had, and no injustice be done to more ancient churches by the new foundations. About this period, however, the practice fell into disuse, probably as the right of the churches already erected became gradually considered as coextensive by common intendment with the parochial boundaries. For in this age, at least, it was the settled doctrine that all lands were regularly to pay tithes to the mother or parish church.

But although little or no vestige appear of resistance made to founding parish churches *de novo* in respect to any antecedent right to tithes in the appointed district, yet the religious orders (b) were always vigilant to dispossess the secular officiating clergy of these their just rights, and were probably not a little sedulous in obtaining fresh grants in the interim that elapsed between the council of Lateran, which prohibited such infeudations to laymen, and pope In-

(z) Seld. c. xi. § 3.

(b) Degge, p. 2. c. 2.

(a) 3 Vin. Lect. 33 & n. c.

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(v) 1 Vin. Lect. 314. 2 Inst. 363.

(w) See 2. R. A. 291.

(x) Seld. c. vi. § 3. & c. ix. § 3. Lexic. var. Παροικία. Filescus in his Paræcia, c. i. calls parochia the popular and corrupt, and paræcia the true orthography, and says, canon decimus quartus apostolorum denuntiat episcopo suam descendi Παροικίας

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(z) Seld. c. xi. § 3.

(b) Degge, p. 2. c. 2.

(a) 3 Vin. Lect. 33 & n. c.

nocent's decretal epistle above referred to, which (*b*) extended the restraint to spiritual persons also, and conventual bodies, enjoining the due payment of tithes to the parochial incumbents. Sir Wm. Blackstone corrects (*c*) an error of Sir H. Hobart and others (*d*), who suppose that council to have prohibited such grants to spiritual persons. But are we not to impute the same oversight even to Lyndwood, a learned canonist, and bishop, in the earlier part of the fifteenth century? For he writes (*e*) that after the council of Lateran tithes could not be granted to any extraneous church or monastery. However, the error of so many of our common lawyers, before it was remarked by the learned commentator, had been pointed out by Sir E. Coke (*f*), who also cites the expressions of one of the judges in the seventh year of Edward the third to the same effect. To this (*g*) decretal epistle, addressed to the archbishop of Canterbury, and received here as law by general consent, may in a great measure be referred the stable and final establishment and security of the parochial clergy's right to their tithes. They are represented, indeed, in several of our old law

(*b*) Cantuarien. archiepiscopo. Ut ecclesiis parochialibus justè decimæ persolvantur. Pervenit ad audientiam nostram quod multi in diocesi tuâ decimas suas integras, vel duas partes ipsarum non illis ecclesiis, in quarum parochiis habitant, vel ubi prædia habent, et à quibus ecclesiastica percipiunt sacramenta, persolvunt, sed eas aliis pro suâ distribuerunt voluntate. Cum igitur inconveniens esse videatur, et a ratione dissimile, ut ecclesiæ quæ spiritualia seminant, metere non debeant à suis parochianis temporalia, et habere fraternitati tuæ auctoritate præsentium indulgemus, ut liceat tibi super hoc non obstit. contradic-

tiene, vel appellatione cujuslibet, seu consuetudine hæcenus observatâ, quod canonicum fuerit ordinare, et facere, quod statueris per censuram ecclesiæ firmiter observari. Nulli ergo, &c. confirmationis, &c. Datum Lateran. 11 nonas Julii. Inner c. iii. op. tom. ii. 452. Coloniz, 1575.

(*c*) 2 B. Com. 27.

(*d*) 2 Inst. 641. Seld. c. vi. § 7. Gwill. Rep. 375, 388, 1556, 1569.

(*e*) Prov. 160. Degge, p. 2. c. 2. 2 Vin. Lect. 87. See also Gwill. 187.

(*f*) 2 Inst. 641. and margin, Seld. c. viii. § 23.

(*g*) See Degge, p. 2. c. 2.

books (*b*) to be originally, and fundamentally due *jure divine*. But it is foreign to the scope and object of this treatise to consider the validity of that antiquated principle as the basis of a legal right. In point of natural justice, it is clear that the clergy have a claim to some public provision, and tithes are the species of such provision prescribed by the municipal law; and these foundations are sufficiently solid on which to rest their title.

(*b*) Dy. 43. a. 1 Cro. 161. 3 Bulstr. 248.

CHAPTER THE SECOND.

Of Tithes, as to whom due, and their legal nature, and properties.

TITHES are by our English lawyers properly ranked among incorporeal hereditaments, because they exist in mental speculation, are subjects of discussion, debate, judicial enquiry, and decision ; are capable of being demised, and have other qualities and properties antecedently to, and independently of, the corporeal produce, which they yield. They are, therefore, considered as of that species of legal property, which lies in grant, to convey which a written instrument, or grant specially so called, was always necessary, in contradistinction to corporeal things, as lands which are said to lie in livery, and might antiently have passed by oral gift and livery of seisin without any written deed.

Tithes are defined by Doctor Wood (a) to be “ the tenth part of the increase yearly arising from the profits of lands, stocks upon the lands, and the industry of the parishioners, payable for the maintenance of the parish priest, by every one that hath things tithable, if he cannot shew a special exemption.” In respect to the persons *from* whom tithes are due, the definition imposes the obligation on all having things tithable, generally excepting only those special cases of exemption to be discussed hereafter. It extends to all occupiers of unprivileged land, whether by wrong,

(a) Inst. L. Engl. 163. ed. 1763.

as (b) trespassers, or by just title. As to the persons to whom tithes are due, the definition declares them now at least to be properly, and entirely spiritual revenue "for the maintenance of the parish priest," without any portion now legally reserved for the bishop, the poor, or the edifice of the church, the repairs of which have with us immemorially devolved on the parishioners at large; those of the chancel only being a burthen on the rector. This, therefore, leads me briefly to enquire who is such parish priest thus legally entitled to tithes.

All tithes within parishes are due of common right to the rector.

I say "within parishes," for the (c) king is entitled to the tithes in places extra parochial, as in parts of forests; and lands are parcel of a parish either by prescription, or by act of parliament.

Edward (d) the first granted to the bishop of Landaff and his successors the tithes of lands within his forest of Dean, (parts of which are extra parochial), "*de novo affartatis et affartandis*." The bishop's lessee suing for tithes, as included in the grant under his lease thereof, it became necessary to ascertain the legal notion of an affart, which is (e) when wood and covert for game is grubbed up, and the ground thus cleared is brought to a state of cultivation. This is a high offence against the forest laws, unless authorized by the formal process of a writ *ad quod damnum*, inquisition, and licence. The court were of opinion in the case before them, that inclosures appertaining to lodges of the king's keepers of his forest removeable at pleasure, did not answer the description of affarts, such inclosures rather

(b) Gwill. 470. but see *ibid.* 544.

(d) Gwill. 1490. Parry v. Hervey.

(c) Gibl. cod. t. xxx. c. 3.

(e) 4 Inst. 307. Bunb. 128.

1 R. A. 657. Sty. 137. Gwill. 501. Gwill. 645. Evans v. Nevill.

episcopis detur; alia clericis; tertia pauperibus; quarta in fabrica ipsius ecclesiæ." Perhaps, however, this rule, after it was so ordained, was not of very extensive prevalence, or duration, or not exactly fulfilled. And indeed the capitulary is scarcely reconcileable in different parts of the compilation. Thus one law directs, "*ut (g) decimæ in potestate episcopi sint, qualiter a presbyteris dispensentur;*" whilst another decrees, "*ut (h) decimæ fideliter sanctæ ecclesiæ reddantur, et presbyteri secundum canonicam regulam fideliter eas dividant;*" this canonical rule is elsewhere (*i*) explained to mean the fourfold division before mentioned, in which latter place the portion of the bishop seems reserved to him in trust to be employed in general purposes of benevolence; for it is said, "*quidquid exinde pontifex jusserit prudenti consilio est faciendum.*" In this law, and a (*k*) subsequent ordinance of the emperor Lewis, the priests are solemnly admonished to make a faithful partition of tithes received, especially among the poor, and not to sell them, nor treasure them up in barns, a practice of which the prevalence is censured. These several quotations indicate, that the quadruple distribution was never strictly or universally adhered to; and a peculiar parochial right seems gradually to have centered in the priests respectively officiating in the churches of the districts where the tithes were produced, except as to so much of them as had fallen into other hands.

For it is observable how very soon (*l*) after the firm and general establishment of tithes on the continent of Europe, they were in many places perverted from their original destinations, and vested in lay hands by grants and conveyances called infeudations. Such grants were made by princes, bishops, religious houses, lords of seignories, out

(g) Linden, 854.

(h) Linden, 944.

(i) Linden, 1102.

(k) Linden, 1188.

(l) Seld. c. vi. f. 4.

of their demesnes, and, perhaps, by private lay patrons in the vacancies of their churches. But the just right of the grantors in making them is not very apparent. The most ancient recorded instance is referred to so early a period as the year 900, and is a patent from a king of France to the first earl of Holland of the church of Hecmunde, or Egmond, with all things thereto duly belonging. Such alienations were about the year 1060 the subject of complaint to pope Alexander the second, and some time afterwards (1) were prohibited by a council of Lateran in terms indiscriminate: Yet they continued so frequent, notwithstanding a like prohibition by another Lateran council in 1139, that about the year 1170 they were made a pretence by some malecontents in the north of Germany for paying no tithes at all, "*præterea (m) et hi adjecerunt non multum a veritate aberrantes quod omnes decimæ in luxus cesserint hominum secularium.*" To remedy so progressive an abuse, a third canon was enacted at a general council of Lateran in 1180 (n) prohibiting for the future such infeudations of tithes from one layman to another, which ecclesiastical ordinance seems to have had an extensive reception in Europe. The alienation of tithes not merely to laymen, but even to spiritual corporations, as abbeys and the like, was not obviated till about twenty years afterwards, by a decretal epistle of pope Innocent the third. In the interval between this council, and Innocent's decretal epistle, tithes might (at least with the consent of the diocesan) be arbitrarily consecrated to a religious house, although they could not be alienated to laymen.

(1) Selden says in 1078. The Chronicl. ap. Corp. Jur. civ. mentions Concil. Lat. in 1068. & Synod. Lat. in 1072. There were many councils of this appellation.

(m) Krantz Wandal, lib. iv. c. 39.

(n) So Chronicl. ap. Corp. jur. civ. Linden, 160, & Selden. But Co. 2 Inst. 641. Degge, p. 2. c. 2. & 2 Bl. Com. 27. place it in the year preceding. See Decretal Greg. IX. l. 3. t. 30. c. 19. with the gloss.

§ III. *Tithes in England.*

IN respect to the payment of tithes in this island, sir William Blackstone says, (o) “ possibly they were contemporary with “ the planting of christianity among the Saxons by Augustin “ the monk about the end of the sixth century.” If the only ground for this surmise is, that the payment was commonly urged, and inculcated from scriptural texts, and as consonant to the divine code, then it may with equal probability be referred to a much earlier period than that monk’s mission from Gregory the Great; for christianity prevailed in general among the Britons, and many ecclesiastical synods were holden here anterior to the Saxon dynasty. It may be remarked, that Augustin (p) inquiring of the pope, as to the bishop’s portion of the oblations of the faithful at the altar, makes no mention of tithes by name. He receives for answer that the custom is generally to make that quadripartite division before alluded to, which thus appears to be not only more antient than the law of Charlemagne on the subject, but (q) conformable also to some very old canon or usage: and this strengthens the former hypothesis concerning the original nature of tithes. In those elder ages, the bishop and his clergy (forming a council or chapter to him) resided together (except such as were sent to minister at a distance), and were in some measure maintained by such pious indefinite offerings without any local limits being ascertained, within which tithes were peculiarly demandable.

The (r) next mission from Rome after that of Augustin was in the year 786, when pope Hadrian the first sent

(o) 2 Bl. Com. 25.

(p) Seld. c. ix. § 2.

(q) Seld. c. vi. § 3. cites, Concil. Antioch. Gwill. Rep. 488.

(r) Seld. c. viii. § 2.

hither Gregory bishop of Ostia, and Theophylact bishop of Todi, for the reformation and establishment of the ecclesiastical code. Accordingly, distinct councils were assembled of the spiritual, and secular powers for the kingdoms of Northumberland and Mercia, the latter of which meetings seems also to have been attended by the states of Wessex, as well as the archbishop of Canterbury, et cæteris episcopis regionum. These ecclesiastical legislators readily embraced and adopted whatever was proposed by the authority and sanction of the legates, and among the rest an ordinance *de decimis dandis*; and thus the payment of tithes became the law of the land throughout the whole, or by far the greater part of the dominions of the Saxon heptarchy, not long after this event consolidated into the monarchy of England. In the succeeding ages frequent mention is made of tithes among the Anglo-Saxon laws: but the first peremptory limitation of them to one church in exclusion of others (other than by endowment) is in the laws (s) of king Edgar about the year 970, by which it was ordained that every man not having erected a church of his own should pay his tithes to the ealban mynstrre, antient minister, (meaning, as the case might be, cathedral, mother church, or monastery), where he heard divine service. The same regard to the more antient places of worship is paid in a constitution (t) enacted about forty years afterwards, under Etheldred the second. But it is to be observed, that the ordinances of king Edgar point to the confirmed and (u) encreasing practice of thanes and great men, who, as religion prevailed, for the convenience of their families and tenants, erected and endowed churches within their respective seignories and domains; the boundaries of which in future determined the officiating minister's function and his emoluments, and such beneficed incumbent had no longer any claim on the com-

(s) Seld. c. viii. § 9. & c. ix.

(t) Seld. c. viii. § 10.

(u) Seld. c. ix. § 4.

mon stock of tithes and oblations in the treasury of the diocese. King Edgar's statutes, indeed, confine such endowments of newly erected and consecrated churches, having places of sepulture annexed to them, to one third only of the founder's tithes. But it is with reason supposed that these divisions or districts were soon considered as parishes of themselves, (rites (*v*) of sepulture being an old characteristic of (*w*) a parish church), and in process of time, perhaps speedily, attracted the two reserved thirds, to which the elder or mother church had once a claim. And I should conjecture, that this rarely happened to the prejudice of another *parish* church, in the sense we now use the term (*x*) (for *paræcia* or *parochia* was originally, and for a long time synonymous with diocese or bishopric; but rather to the diminution of the revenues of some episcopal see or monastery, which were reciprocally relieved by having fewer officiating clergy to support. The bishop's consent was necessary to the consecration of the new church; he could therefore have no ground for complaint. Many waste and uninhabited spots, not therefore attached to any parish, as they afterwards became cultivated, built upon, and populous, required a resident priest, and were enabled to render him temporal remuneration. Moreover, in places avowedly parochial, it is thought (*y*) that long after king Edgar's time tithes were demanded as due by prescription, or by special consecration of them to the incumbent's benefice, and merely of common right as at present and as annexed to

(*v*) 1 Vin. Lect. 314. 2 Inst. 363.

(*w*) See 2. R. A. 291.

(*x*) Seld. c. vi. § 3. & c. ix. § 3. Lexic. var. Παροικία. Filescus in his Paræcia, c. i. calls parochia the popular and corrupt, and paræcia the true orthography, and says, canon decimus quartus apostolorum denuntiat episcopo suam deferenti Παροικίαν

seu diocesim, &c. Decretal Greg IX.

c. 111. t. 30. c. 20. de parochiâ unius episcopi in diocesim alterius. Gwill. Rep. 488. aliquando parochia pro diocesi ponitur. Diocesis interdum pro parochiâ. Rebuffi tract. de decimis quæst vi. § 6. See also 5 Co. 67 a.

(*y*) Seld. c. ix. § 3.

the spiritual care of the parishioners resident within the limits. I should therefore ascribe the erection of the greater number of our comparatively more modern parishes to places where no tithes were before payable to any parochial benefice. And these observations collectively may account for the establishment of the incumbent's peculiar and exclusive right to tithes in his parochial limits of recent foundation, without traces found of any controversy in any of the many districts in which these new endowments successively took effect for more than a century downwards from the Norman invasion. Inasmuch that in (z) an epistle from king John to pope Innocent the third, it is claimed as (a) lawful by the custom of the realm for the bishops, earls, and barons to found churches within their seignories. The right is claimed generally, but the recognition of it, as allowed to laymen, is subject to provisos, that the bishop's assent be had, and no injustice be done to more ancient churches by the new foundations. About this period, however, the practice fell into disuse, probably as the right of the churches already erected became gradually considered as coextensive by common intendment with the parochial boundaries. For in this age, at least, it was the settled doctrine that all lands were regularly to pay tithes to the mother or parish church.

But although little or no vestige appear of resistance made to founding parish churches *de novo* in respect to any antecedent right to tithes in the appointed district, yet the religious orders (b) were always vigilant to dispossess the secular officiating clergy of these their just rights, and were probably not a little sedulous in obtaining fresh grants in the interim that elapsed between the council of Lateran, which prohibited such infeudations to laymen, and pope In-

(z) Seld. c. xi. § 3.

(b) Degge, p. 2. c. 2.

(a) 3 Vin. Lect. 33 & n. c.

obsolete, and the mixed action of ejectment (*e*) which hath superseded it in practice was long since determined to lie for tithes, against the adverse claimant of the temporal inheritance. Farther, as real estates, a husband (*f*) shall be tenant by the courtesy of tithes, and a wife shall have dower of them. Writs of dower are indeed particularly mentioned by the statute: on one (*g*) of which occasions where the countess of Oxford was demandant, it was resolved, that the proper assignment of the dowress's thirds was by allotting to her the third tithe shock and the like, and not the tithes of a third part of the arable land, for then the occupier might forbear to cultivate or sow the assigned spot. Sir Edward Coke (*h*) cites as a maxim "*nullus pro decimis quæ sunt spirituales de aliquâ reparatione pontis seu aliquibus oneribus temporalibus onerari debet.*" But at this day (he adds) if tithes be in the hands of temporal men, they are by reason of them contributory to temporal charges. Still indeed (*i*), spiritual persons and benefices are exempt from charges at common law, though liable to the burthens imposed by statute. Lastly, so completely are tithes in lay hands become temporal property, that the (*j*) right to them is assets in the hands of an heir or executor for payment of the deceased owner's debts only (says Sir E. Coke) they have this ecclesiastical quality remaining, that the proprietor may sue for the subtraction of them in the ecclesiastical court.

(*e*) 1 Cro. 301. W. Jon. 321.
Degge, P. 2. c. 18.

(*f*) 1 Inst. 159 a.

(*g*) 11 Co. 25 b.

(*h*) 2 Inst. 641.

(*i*) Degge, P. 2. c. 15. where
there is a clear and judicious ac-

count of first fruits, and other charges due from incumbents, and where it appears that impropriations are subject to the payment of procurations, but donatives are exempt.

(*j*) 1 Inst. 159 a.

But

But a portion (*k*) of impropriate tithes cannot be parcel of a manor, nor of copyhold tenure, nor demisable by copy of court roll; for which one reason given is, that tithes could not be immemorially demisable, because (*l*) before the council of Lateran no absolute exclusive interest in them belonged to any individual. This reason is scarcely sufficient. The real effect of the decrees of that council has been before shewn, and there can be little doubt that in many spots tithes were devoted by particular special endowment in permanent exclusive right to parish churches, as well as to monasteries. Another, and to me more satisfactory reason, is also assigned, namely, that tithes are of spiritual origin, and of a distinct nature from a manor. And this is correspondent to the ancient principles of our law, according to which all (*m*) ecclesiastical possessions are holden by the free tenure of frankalmoigne. Tithes therefore in the enjoyment of spiritual persons, or of such lay impropriators as have succeeded them in their revenues and immunities are freehold estates, whatever be the condition of the lands themselves out of which they issue, being a separate and distinct inheritance. Thus it seems the lay impropriator of tithes arising from copyhold lands is entitled as a freeholder to vote at county elections.

In this view tithes are distinguishable from rents, and similar charges issuing out of lands, which follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be also of that tenure. Land (*n*) merely freehold though holden of a manor, is not parcel of it; and there appears to be less reason, that tithes being freehold should be parcel of a manor. But the entire parsonage (*o*) may be a

(*k*) 1 Cro. 293, 814. Gwill. 164. (*m*) Bract. lib. c. 28. 1 Black. Sherwood v. Winchcombe. Gwill. tract. 115, 116. cited. 2 Vin. Left. 31.

1569. Sands v. Drury.

(*n*) 2 R. A. 120.

(*l*) See Gwill. 123. n. 375, 388.

(*o*) Watf. 362.

manor of itself, for if before the statute (*p*) of *quia emptores terrarum* the parson with the patron and ordinary granted parcel of the glebe to divers persons to hold of the parson by divers services, the same would have made the parsonage a manor.

Improprate (*q*) tithes, like incorporeal hereditaments in general, may be the subjects of grants and other conveyances, and will pass by the name of "hereditaments." And by the before-mentioned statute 32 H. 8. c. 7. § 7. it is specially enacted, that writs of covenants and other writs for fines to be levied, and all other assurances to be had of any parsonage, vicarage, portion, pension, or other profit "called ecclesiastical or spiritual" then made temporal, shall be thereafter devised and granted in the chancery, according as hath been used for fines to be levied, and assurance to be had of lands. Thus distinct portions of tithes, which have immemorially subsisted, as well as a whole impropriate rectory, may be the subject of conveyance like other real property. And if (*r*) Titius have a portion of tithes, and afterwards become owner of the rectory where they arise, the portion is not extinct, but continues grantable, for it may be of greater antiquity than the establishment of the rectorial right in that district.

Sometimes a grant or conveyance of a portion of impropriate tithes will even be presumed, and positive proof, for the production of the grant, will be dispensed with. As where (*s*) the same person soon after the Norman conquest was seised of a manor, and of such portion as distinct and separate from the rectory: the portion was granted by Henry VIII. to the dean and chapter of Rochester, the manor and limited estate then being

(*p*) 2 Vin. Lect. 38. & n. v.

Sir E. Coke's case.

(*q*) Degge, P. 2. c. 18.

(*r*) Gwill. 1513; Oxenden v.

(*s*) 2 Rol. Rep. 161. Gwill. 375. Skinner.

in other hands; but the dean and chapter never had possession under the grant of such portion, never having received tithes from the estate; and although in the several successive conveyances of it there was not express mention of tithes, lord Kenyon held, that the owner of the estate might, under these circumstances, establish a good title to the tithes also. Who could disturb it? Not the rector, for these tithes have been severed from the rectory almost from the conquest; if indeed they had been part of the rectorial tithes, no time would have barred him; where exists any other title? The dean and chapter before the disabling statute, 13 Elizabeth, might have alienated them; after a possession of two centuries and a half by the successive owners of the estate, a conveyance of these tithes from the dean and chapter is to be presumed. The possession here spoken of was rather a retainer, which must necessarily happen, where the right to tithes and the occupation of the land, whence they arise are united in the same individual. There results a suspension of actual payment, but no suspension of the abstract right. Thus, if (t) a parson is seised in fee of and occupies tithable lands within his own parish, such estate during this unity of possession hath with some impropriety been called untithable, because he cannot pay tithes to himself; but if he leases his rectory, then the parson himself shall pay tithes for his other estate to such lessee; and if he aliens his other estate, he shall receive the tithes of it as rector, from his alienee; because the right of tithes cannot be utterly extinguished by a temporary unity of possession. If he sows (v) his glebe, and sells the corn growing, he shall receive tithes from the vendee. If he (u) leases his glebe for years, rendering

(t) Dy. 43 a. Gwill. 118.

(u) 1 Cro. 161. Gwill. 119. n.

(v) Degge, P. 2. c. 2.

rent "for all exactions and demands" the lessee shall pay tithes for such glebe, for they will not pass to him by these general words. But a grant (*w*) of all a man's right, title, and interest in tithes, will pass a lease of them.

Positive and express alienations of the inheritance in impropriate tithes afford little scope for observations derived peculiarly from the subject of such conveyances. But leases of them, made either by spiritual incumbents, or corporations, or by lay impropiators, which transfer only a partial, or temporary interest, require and deserve more particular discussion.

, By (*) the common law, churchmen after being completely inducted into their benefices, and reputed to be seised in fee in right of them, enjoyed as ample power of leasing as any person seised of a temporal estate in his natural capacity, provided the consent of necessary parties was previously obtained. To leases by ecclesiastical corporations aggregate, no consent was essential. But to those made by sole ecclesiastical corporations as bishops, deans, arch-deacons, prebendaries, parsons, and vicars, the consent and affirmation of others were required in order to bind their respective successors. Thus, the demises of parochial incumbents were to be sanctioned by the patron and ordinary, and those of bishops by the chapter. Considerable alteration, however, is introduced by the several enabling and restraining statutes, as they are called, namely, 32 H. 8. c. 28. 1 El. c. 19. 13 El. c. 10. 14 El. c. 11. & 14. 18 El. c. 11. 43 El. c. 29. and 1 Jac. 1. c. 3. Tithes belonging to spiritual persons, being a frequent subject of such leases, it is material to notice the effect of these laws. Their principal result so far as

(*w*) 2 Cro. 318. Gwill. 249. (*) Watf. c. 41. 1 Inst. 44 a.
Arnold v. Bidgood.

affects the general objects of these enquiries is, that all ecclesiastical elemosynary corporations, and all parsons or vicars are restrained from making any leases (other than of houses), except such as shall not exceed twenty-one years, *or* three lives from the making; they must not be for that number both of years and lives, but they may be for a less term or fewer lives; although indeed, till a late statute which I shall presently mention, leases of tithes could be made for years only, and not for a life or lives (which latter are freehold leases), so as to bind the ecclesiastical successor. Another important qualification of leases pursuant to these statutes is, that the antient accustomed rent, or more, must be reserved. The (y) last requisite I shall mention as affecting the subject of our enquiries, is, that in restraint of concurrent leases. It is, however, to be observed, that the restrictive (z) statutes do not empower the making of leases unauthorised by the common law. Therefore, a parson or vicar, although he be restrained from leasing for longer than twenty-one years, even with the consent of the patron or ordinary; yet is not enabled to make a lease of any kind, or for any period, so as to bind his successor without obtaining such consent; for leases of parsons and vicars are expressly excepted out of the enabling statute (a) of Henry VIII. and the other acts are of a disabling tendency. It is also to be remarked that, although (b) it be provided by some of these acts, that leases not warranted thereby shall be utterly void and of no effect to all intents, constructions, and purposes, yet such leases are not void, but good against the lessor himself in the case of a sole corporation; or if it be a corporation aggregate

(y) See 2 Black. Com. 319, 321. Indeed it has been a doubt whether tithes could be leased at all within these statutes, and antecedently to stat. 5. Geo. 3. c. 17. as mentioned hereafter.

(z) 2 Black. Com. 321. 1 Inst. 44 b.

(a) § 4.

(b) 1 Inst. 45. n. & 13 ed. n. 4.

so long as the dean or other head thereof remains, for the statutes were made for the benefit of the successor. Moreover, it seems, that if a lease (c) not warranted by the statutes, be made of tithes for years by a bishop, this is not void, but voidable only in respect even of the successor, and if the latter accept rent, it amounts to a confirmation. For it is said (d), that before the third council of Nice in the year 710, bishops might by their sole alienation have bound the successor for ever; and although by that council such alienations are restrained as injurious to the church, and the confirmation of the dean and chapter made necessary, yet this is only as to binding the successor. For the fee simple (e) is reputed to continue in the bishops, and therefore leases for years made by them subsist after their death, or removal, till avoided by the successor, with the aid of the canons made at that council, which have received a sanction from our law. But parsons and vicars never had such power of alienation; and though (f) they have been deemed for the benefit of the church and their successors to be seised of a sort of qualified *inheritance*, they have been allowed an estate for life only, as to any acts that might prejudice the next incumbents. Therefore, leases for years by parsons and vicars not confirmed by the patron and ordinary, become absolutely void by the death, or cession of the lessors, and are not confirmed for the residue of the term against the successor by his acceptance of rent. I say their leases for years, because leases for life or lives of tithes made by any ecclesiastical persons, are, on the principles of the common law, without the aid of the statutes,

(c) Br. t. Acceptance, pl. 9. t. matters but not all strictly in point.
Lease, pl. 18. Moore 778. (e) Pl. 264.

(d) Bac. Abr. t. Leases H. where (f) 1 Inst. 341 a.
many authorities are cited as to these

which

which I shall presently mention, valid only against the lessors themselves, and are absolutely void against the successor, and incapable of being ratified by his acceptance of rent; and, also, because (g) the leases for life or lives by parsons or vicars of things that lie in livery, as of their glebe land, are avoidable only by reason that such leases being freehold could not be effected without the solemnity of livery of seisin, where any thing (h) corporeal was conveyed, and consequently required the entry of the successor to defeat them, who could not so enter after rent received, or any other act done by him in affirmance of the lease. In like manner if a disseisor or other wrongful possessor of lands without the right thereto conveys an estate for life by livery of seisin, a freehold interest actually passes; which is founded on the efficacy of this solemn mode of assurance without regard paid to the imbecility of the alienor's title. This digression was necessary to explain, why I confine the doctrine of leases by parsons and vicars without confirmation by patron and ordinary, being wholly void on the death or amotion of the lessor, and incapable of being substantiated against the successor, to leases for years only. It seems, however, that the leases (i) of parsons confirmed by patron and ordinary, and otherwise conformable to the statutes, are good, although made by a parson *de facto* only, and who is afterwards lawfully deprived of his benefice.

The acceptance of rent, which is to affirm the voidable lease of a preceding bishop, must be by him, who is perfectly in possession as successor, at least according to one case (j), in which such acceptance of rent was deemed unavailable, because the successor had not at the time obtained restitution of the temporalities; but it may be

(g) Br. t. Acceptance, pl. 26. v. Hill and 2 Anstr. 413. S. C.
t. Lease, pl. 19.

(i) 1 R. A. 476.

(h) See Gwill. 1421. Brewer

(j) Palm. 175.

questioned,

questioned, whether that point would now receive the same adjudication. It appears more equitable (*k*), that the rule should be mutual; that if the lease is voidable both lessor and lessee should be bound by affirmance; or if absolutely void without entry, or other ceremony, both should be discharged. In the latter instance the successor has no remedy under the covenants in the lease, nor for the stipulated rent accrued in his own time; but I apprehend he might maintain an action for use and occupation, or for the mesne profits after a recovery in ejectment.

Besides the restrictions above mentioned and alluded to, there existed till very lately another mode, by which the leases of beneficed clergymen were rendered void. This happened in case of their non-residence, it being first so enacted by statute 13 El. c. 20. But that statute with all its legislative explanations, additions, and alterations, and so much of the act 3 Car. 1. c. 4. as make the first act perpetual, are by statute 43 G. 3. c. 84. § 10. now repealed. The residence of the beneficed clergy is enforced so far as was judged proper by new regulations, without substituting any new provisions by reason of absence from their cures in restraint of the validity of their leases; on the contrary, this to a certain extent may be ranked as an enabling statute. For the statute 21 H. 8. c. 13. prohibiting spiritual persons from taking farms, is in some measure abridged in its operation, by the recent statute, by which it is enacted, that it shall be lawful for any person having or holding any vicarage or perpetual curacy, or for the stipendiary curate thereof respectively, to occupy by himself or any other to his use in farm of the lease or grant of any person or persons, the impropriate parsonage, rectory, or vicarage respectively, of the parish of which such spiritual person shall be the vicar or perpetual curate or stipen-

(*k*) Poph. 121.

(*l*) § 7.

diary curate, or any part or parts thereof respectively, or to take any profit or rent out of any such farm without being subject to any pains, penalties, or forfeitures under the recited act of Henry VIII. The taking, thus authorized, it is to be remarked, is confined to the parish where the lessee officiates, sanctioning a lease of premises within its boundaries only. But independently of such local limitation, some doubt may be entertained as to tithes, whether they are restrained from being leased to spiritual persons by the law of Henry VIII. under the words "tenements or" hereditaments.

I have before intimated that freehold leases of tithes were heretofore void in favour of the successor. Thus, where a bishop (*m*) being seised in fee of tithes in right of his bishoprick, made a lease thereof for three lives, rendering the antient rent at which they had usually been demised; the lessor died, and the question was, whether the lease was binding upon the successor: it was resolved, that it did not bind him; for he had no remedy for the rent, either by distress, or by action of debt, because it could not be called rent; but it would have been otherwise if it had been a lease for years, for in such case an action of debt may be maintained. Annual payments (*n*) reserved out of incorporeal hereditaments, were not by our old lawyers allowed to be properly rents, for this reason, that they were not recoverable by distress, the terms being convertible. Such payments could not be distrained for, because incorporeal hereditaments, as creatures of the imagination, have no locality; and by the antient statute of Marlbridge 52 H. 3. c 15. (which is said (*o*) to be but an affirmation of the common law), distresses must be locally made. Consequently, if a yearly payment had been reserved on the

(*m*) Moore 778.

(*o*) 2 Inst. 131.

(*n*) 2 Vin. Lect. 67, & seq.

demise of tithes, and something corporeal, as a barn, jointly, the same was considered as a rent issuing (p) wholly out of the barn in respect to the remedy by distress. Neither could the successor maintain an action of debt on a freehold demise of tithes during (q) the continuance of the estate for life or lives; because that is a personal action, and to recover rents so reserved would be to recover seisin, which species of judgment is descriptive of a real action. Hence it is that (r) even acceptance of rent by the succeeding bishop, would not have availed to substantiate a freehold demise of tithes, because if the rent afterwards became in arrear, he was without remedy under the lease, being precluded from the easy and obvious resources of distress and action of debt, and also from bringing a species of real action, called an assize (s) of rent, for such payments out of things incorporeal are no legal rents. Now, however, by the statute above alluded to, 5 G. 3. c. 17. the same power of bringing actions of debt, which by a former law 8 Ann. c. 14. § 4. had been indulged to lessors against tenants for life as to proper rents, is extended to sole and aggregate ecclesiastical corporations, heads and fellows of colleges, and others having power of leasing, to recover rent reserved on tithes and incorporeal hereditaments, although leased for life or lives. The statute of George III. recites, that it may be doubtful whether by the laws in being such lessors as aforesaid could grant leases of tithes or other incorporeal hereditaments; which lie in grant, and not in livery, for three lives or for twenty-one years, although the antient rent or yearly sum is thereby reserved, and all other requisities prescribed by the acts of parliament are justly observed, by reason that there is generally no place wherein to distrain for such rent or yearly

(p) Gwill. 359.

(r) 2 Cro. 173.

(q) St. 8 Ann. c. 14. § 4.

(s) 8 Co. 46 a.

sum;

sum; and that it may also be doubtful, whether in cases of such leases for life or lives, there was any remedy by action of debt or otherwise; but it is not represented as in any degree questionable, whether the lessors and their successors might have that personal suit on a demise for *years*: and the other doubts recited may perhaps be thought resolved by the foregoing discussion, except as to the power of such ecclesiastical and other persons to grant leases for years of tithes (t) and other incorporeal hereditaments, because, although here the remedy by action of debt might be had, yet the other remedy by distress failing, and so the payment reserved not being properly a *rent*, the antient rent could not be said to be reserved, which is one of the requisites prescribed by the acts of parliament. After these recitals, the new statute proceeds to give validity to all such leases of tithes and incorporeal hereditaments (with a saving, however, of the restrictions imposed by the founders on colleges, and of the like local regulations), and allows the action of debt to be maintainable by the lessors themselves, their personal representatives, or their successors for the rent due on such leases, whether made for life or for years. But the act of parliament names divers corporations sole, and aggregate, and then adds, “any other person or persons having any spiritual or ecclesiastical promotions,” without any mention of lay impropriators, and therefore a question has been raised (v) of what remedy at common law such lay impropriator could avail himself to recover the yearly payments reserved on a lease granted by him of his tithes for life or lives if he should so demise them; but perhaps that law now giving such payments the denomination of rents, they might fall within the provisions of the statute of Anne above-mentioned; if not, there is this defect which still remains to be supplied.

(t) See 1 Inst. 44 b. & 13 ed. (v) 2 Vin. Lect. 70.

into for a reciprocal valuable consideration, as an annual payment; and it may be good during the incumbency, and be explicitly extended to the farmers and tenants of a landlord so contracting.

Again, a demise (*a*) of tithes during such time as the lessor shall continue rector or vicar, passes to the lessee a freehold, such being the estimation of uncertain interests in all species of real property, which may possibly endure for any life or lives; and with respect to incorporeal hereditaments as tithes are, and lie in grant, the mere tradition of the deed has the same force as livery of seisin in the case of land; but if a rectorial or vicarage house, (which are corporeal hereditaments, and lie in livery) are demised with the tithes, and the latter only pass as parcel of the rectory or vicarage, the intended freehold demise is ineffectual for the whole, as conveyances at common law, without livery of seisin.

A lay impropriator in fee, may lease his whole rectory or a parcel of it, as the tithes of a particular farm, for any number of years without restraint; and if he demises such parcel (*b*), and subsequently to that lease makes a grant of the rectory generally, the grantee will be entitled to the tithes of that farm, after the lessee's term is expired, though if the lease is made (as commonly) to the occupier of the land, there is, during its continuance, a suspension of actual payment of these tithes, for they exist in speculation as parcel of the rectory; and the reversion in them subject to the term passes to the grantee.

As a lay impropriator in fee has the uncontrolled disposal of this species of real property in his life-time, so doubtless, he may by his will legally executed, devise a

(*a*) Gwill. 1451. 2, *Brewer v. Hill*, from 2 Anstr. 413

(*b*) Gwill. 358-9. *Dickinson v. Reade*.

partial or absolute interest therein; and if a man (c) devises all his lands in A. having no real property, except a portion of tithes there, the portion will pass to the devise notwithstanding the incompetence of the description, that the will may not be wholly inoperative.

Having thus far, treated of the legal nature, and properties of tithes, and of the several rights by which they may become due and be received, it remains only to speak of sequestrations, which are within the scope of the present chapter, both as descriptive of the quality of tithes, and as shewing who may have a temporary right to demand them. Sequestrations are in use on various occasions: First, it being incidental to tithes and other spiritual possessions, to be exempted from the sheriff's power of levying thereout any judgment debt (which Sir Edward Coke (d) enumerates among the privileges preserved to the church by *Magna Charta*). On (e) such sheriff's return to a writ of execution directed to him, that the defendant is a beneficed clergyman, having no lay fee, a writ called a *levari facias* issues, requiring the diocesan to levy the demand out of his ecclesiastical goods, and by virtue thereof, his tithes shall be sequestered. Such process, indeed, has been (f) contended not to be a proper sequestration, because the return of the bishop is to be (as of a sort of ecclesiastical sheriff) *feri feci*, or *nulla bona*, and not *sequestrari feci*; but the distinction rests in mere matter of form.

Another (g) occasion of sequestration occurs, where the right to a benefice is in controversy, and a suit is depending to try which of two claimants is the lawful incumbent

(c) Swinb. 140. 9 Mod. 74. tion, F. N. B. 599. 1 Sel. 320.
 3 Wms. 386. (f) 1 Mod. 260. 2 Mod. 257.
 (d) 2 Inst. 4. (g) Watl. exxx.
 (e) Burn. Eccl. L. t. Sequestra-

of a parsonage, or vicarage ; or after sentence against one party, who has appealed to a higher jurisdiction.

The general course of proceeding seems to be this : — On a proper petition in the case last put, by either of the litigants, alleging the controversy, and that opposition is made to collecting the profits, the ecclesiastical judge decrees, that the fruits of the church be sequestered, and commits the power of collecting them to the churchwardens, or some others of the same parish, who thus acquire a temporary right of receiving the tithes ; which, Dr. Burn says, it is best, and most legal for the sequestrators to receive in kind. But the judge previously takes a bond from the persons to whom this authority is deputed, with a condition underwritten, duly to collect the profits, and to render a just account thereof; and where the right to the incumbency is in dispute, he usually appoints some minister to serve the cure for the time, that such controversy shall be depending, and requires the sequestrators to allow an appointed salary out of the profits of the church to such officiating curate: and he also orders them to cause the sequestration to be published in the church in the time of divine service, that the parishioners (*b*) may know to whom tithes are to be paid. After the sequestration hath answered its purpose, and is taken off (as when a judgment debt is raised and satisfied ; or when the litigation respecting the right of the benefice is determined), the clear residue of the profits collected is to be restored to the party entitled to them in specie, if they remain so, or if not, their value is to be paid to him. Thus the sequestrators, if unwilling of their own accord, are compellable to do by the spiritual court, and if being summoned there, they delay coming to a just account, the judge may deliver the aforesaid bond to the party aggrieved, in order to his suing upon it at the common law.

(*b*) God. Rep. can. app. 15.

A third case for sequestration is, as a remedy for (i) dilapidations. Thus, when the rectorial house or chancel, which the incumbent (k) is bound to repair, is in a decayed and ruined state, if after due admonition he shall delay to begin repairing the same for the space of two months, then the bishop shall sequester the tithes and profits of the benefice till the necessary repairs shall be accomplished. The admonition may proceed from the archdeacon; but the diocesan only has the power of sequestration. The whole (l), however, ought not to be sequestered for dilapidations, but a competent allowance left for the incumbent's maintainance.

Lay impropiators are generally under the same obligation of repairing the chancel, as spiritual rectors; but (m) impropriate tithes cannot be on this account sequestered. This at least (n), seems admitted to be the prevailing opinion among the common lawyers. For although bishop Gibson alleges reasons against it, particularly, that nothing was conveyed to the king at the dissolution of the monasteries, but what those bodies had enjoyed, that is, the profits over and above the finding of divine service, the repairing of the chancel, and other ecclesiastical burthens: Yet the legislature having made such impropriations lay fees, they of course become exempt from the jurisdiction of the spiritual court, and this seems conclusive on the argument. But, for (o) neglecting the repairs of the chancel, lay impropiators are personally amenable to the ecclesiastical tribunal, and may be proceeded against by citation, censures, and excommunication. Dr. Burn (p) recom-

(i) God. Rep. 14.

2 Vent. 35. 3 Keb. 829. cont.

(k) A vicar may be bound to repair the chancel, or to contribute thereto, Lynd. 253.

(n) Ayl. Par. i. can. 495. Cod. 199.

(l) 2 Vent. 35.

(o) Ayl. ibid. 3 Keb. 829.

(m) 1 Mod. 258. 2 Mod. 254.

(p) 1 Burn, 322.

mends the course proper to be pursued, and seems to think it necessary for churchwardens who sue, to prove that the parties prosecuted, (for there may be more than one impropriator), have received tithes or other profits belonging to the rectory, sufficient to answer the repairs, and adds, they must settle the proportion among themselves.

On this occasion, at least, however, it is requisite to distinguish between appropriations, and impropriations, though often mentioned indiscriminately. The latter, as may have been collected from what has been before stated, are such parsonages as having belonged to the religious houses by the statutes for dissolving those bodies, came to the king, and from him to his patentees, and are now vested in lay hands. The same account may be given, I apprehend, of most, but not (q) all *portions* of impropriate tithes, at present in lay hands. An appropriation (r) is where such a parsonage or other church preferment belongs to, and is in the possession of some ecclesiastical corporation, sole or aggregate, and their successors, of which there (s) are alledged to be in England above a thousand. And as to such of them, at least, as never were the property of the religious houses, and, therefore, certainly were not made temporal fees, by the statutes of dissolution there appears no ground (t) to exempt them from the power of sequestration for neglecting the repairs of the chancel, more especially, as corporations aggregate (the more frequent owners of them) are not capable of being excommunicated. And it seems clear, that (u) where a prebendary possesses tithes, or other spiritual revenue, as annexed to his peculiar stall, or in his sole and distinct right, a sequestration may issue for dilapidations. But where he is only entitled

(q) Gwill. 1513.

(r) 4 Burn, 10.

(s) 2 Mod. 257.

(t) 2 Mod. 254.

(u) 1 Sel. 321.

as a member of the body aggregate, the estate of the corporation cannot be sequestered for the default, or debt of the individual.

Another (*x*) common occasion of sequestration is the avoidance of a benefice. During the vacancy, the churchwardens are to receive the tithes and profits by the bishop's appointment, under the seal of his court, to provide for the cure, and to render an account to the successor. The ordinary (*y*) has this power, though the right of presentation be in the king, if he omit the exercise of it, that there may not be an interruption of divine service.

Lastly, the (*z*) tithes and profits of a benefice may be sequestered, where the incumbent neglects the cure; and such was (*a*) the implied mode by which the ordinary was to collect, in order to distribute among the poor of the parish, one year's profits of the benefice of an incumbent, not residing, forfeited by statute 13 El. c. 20. while that law was in force. It is, therefore, consistent with ancient and systematic usage on this occasion, that the recent statute 43 G. 3. c. 84. which repeals the former act, directs its regulations to be partly enforced by sequestration as to such non-residence of beneficed clergymen, as is not authorised by licence, or exemption under the new law. First, it is thereby properly and justly provided, and in (*b*) conformity to the principles of our old law, that (*c*) no penalties or costs incurred by non residence, and judgment shall be levied by taking in execution the body of the party sued, where it shall appear that the demand may be raised out of his preferment by sequestration within the term of three years; secondly, in (*d*) case of the diocesan's monition to

(*x*) Ayl. ibid. God. ibid.

(*a*) Wat. c. xliii.

(*y*) Doct. and Stud. dial. ii. c. 36.

(*b*) F. N. B. 305.

Wat. 72. 2 Mod. 255.

(*c*) § 17.

(*z*) God. ibid. 15.

(*d*) § 30.

a spiritual person to reside, and perform the duties of his cure, and no return made thereto, or one that is unsatisfactory, it shall be lawful for such diocesan to issue an order in writing enjoining residence, and if that be not complied with, to sequester the profits, with a power, however, given to a party thinking himself aggrieved, of appealing to the archbishop of the province. Lastly, if (e) a clergyman shall continue three years under sequestration for non-residence, or shall within that space incur three sequestrations, not being relieved as to any of them on appeal, his benefice shall become *ipso facto* void, and the patron may present thereto some clerk other than the party sequestered, as if vacant by natural death, or resignation.

Sequestration is only a temporal suspension of the incumbent's perception of the profits. It is said (f) not to bind the interest, nor put the rector out of possession. Certainly institution and induction *de novo*, after sequestration is taken off, are not necessary to reinstate him in his right to tithes. And (g) if the continuing incumbent, or successor, as the case may be, is dissatisfied with what the sequesterators have done in the execution of their charge, the more proper tribunal in which to call them to account, and for redress, seems to be the spiritual court; and if he still considers himself aggrieved, he may carry on the cause by appeal through the ascending series of ecclesiastical jurisdictions,

(e) § 33.

(f) 1 Mod. 359.

(g) 4 Burn, 318.

CHAPTER THE THIRD.

Divisions of Tithes ; and Matters between Rector and Vicar,

TITHES have been variously divided and classed.

I. (a) The most approved, and unexceptionable division of tithes, generically, seems that which distributes them into three classes, of predial, mixt, and personal. This distribution is alluded to by the definition of tithes given in the last chapter. Predial tithes, or tithes (b) *quid- quid-oritur ex prædis*, are derived immediately from the ground, as corn, and hay, and other fruits of the earth. Mixt tithes are produced mediately through animals, which have their sustenance and nourishment from the ground. Personal tithes arise from the labour, and industry of man.

The first material distinction flowing from this division, is made by the statute 2 and 3 E. 6. c. 13. which requires all the king's subjects truly and justly without fraud or guile to set out and pay their predial tithes (*eo nomine*) in their proper kind, in such manner as hath been of right yielded within forty years next before the making of that act, or of right ought to have been paid. The necessity (c) of setting out tithes, is applicable to predial tithes only.

(a) Doct. & Stud. dial. ii. c. 35. Trin. Coll. Camb. from Anst. 760.
 § 313. — Degge, p. ii. c. 1. — Gwill. (b) Rebuffus cited, Gwill. 429.
 356, 29, 429, 430. 1447. — Scan v. (c) Gwill. 428. Norton v. Clarke.

Mixt tithes are said to arise from the earth also, but by means of animals depastured on it, or otherwise nourished with its fruits. In this class, therefore, are (*d*) enumerated, not only the live encrease, or young broods of cattle, and poultry, but other profits resulting through the medium of animals so nurtured, as wool, milk, cheese, and eggs.

In (*e*) a recent case, the principal question was, whether agistment tithe (that is tithe of pasturage, or more properly (*f*) tithe in respect to herbage, or grass eaten by cattle not tithable), was a predial, or mixed tithe. To shew it to be the former, it was argued, that it was paid not for the encrease or improvement of the animal agisted, but for the grass eaten by it, and was proportioned to the value of the grass, not to the value of the actual improvement; that when the occupier of land does not agist his own cattle, but those of strangers, the tithe for the agistment of barren cattle is due from the occupier as owner of the grass, and that if the grass has before paid tithe of hay, no tithe is due for the agistment of the aftermath; hence it was inferred, that the tithe was attached to the grass, not to the cattle. On the other hand, the afore said statute of Edward the Sixth was relied on as establishing, that all predial tithes were such as might be set out, agistment tithe is incapable of being so; and it was among other things contended, that animals reared for the plough, or pail do not pay tithe when young; yet, if the tenant changes his mind and sells them, agistment tithe becomes due from the first; but if it were tithe for the grass it would have been due immediately, and would not have depended on a future event. But the court held, that the arguments used on the part of the farmers, satisf-

(*d*) Watf. c. xlix.

(*f*) Gwill. 1335. in *Ellis v. Saul*,

(*e*) 3 Anst. 760.—Gwill. 1445. from 1 Anst. 332. Gwill. 1447.

Scan v. Trin. Coll. Camb. & Wood,

factorily proved, that agistment tithe is the tithe of the grafs eaten, which arifes immediately from the foil, and, therefore, it is a predial tithe ; and as to the statute, which affixes a penalty on not fetting out predial tithes, it muft be understood, as relating to thofe only, which are capable of being fet out.

Predial, and mixt tithes are to be paid according to the value of the articles tithable, without (g) deducing for labour and expences : but as to the third clafs, personal tithes arifing from the personal labour of the parifhioners, the tenth (h), of the clear gains only is due.

These personal tithes are fupposed to have become lefs confiderable than they were formerly. For they are thus defcribed by Lindwood (i) “*fic dictæ quia potius refpectu perfonæ folvuntur quam rei utputa de arificio negotiatione & militia :*” and Watfon (k) fpeaks of them as payable by men of numerous occupations and defcriptions, viz. buying, felling, merchandizing, fifhing, fowling, hunting, or following any trade. Their finking into difufe, is attributed by Dr. Wood (l) to the claufe in the ftatute 2 & 3 E. 6. c. 13. which does not allow the ordinary to examine a parifhioner on oath as to thefe personal tithes. By the fame ftatute § 7. day-labourers are exempted from this payment. It has alfo been determined (m), that an innkeeper is not chargeable with them in refpect of the profit made by the fale of wine and beer, nor any perfon for the gain of money put out at intereft. It would, therefore, perhaps be difficult to find any fpecies (except the two articles hereafter mentioned) of personal tithes, as payable at this day ; the ftatute (n) confining the payment to fuch perfons, and

(g) Gwill. 430.

(h) St 2 & 3 E.

(i) Prov. 195.

(k) C. xlix. and li.

(l) Infl. 176.

(m) 2 Bul. 141.

(n) § 7.

places, by whom, and in which the same have been *accustomably* used, or ought to have been made within *these* forty years, that is, next before passing the act; adverting, as it seems, to the rule of the ecclesiastical courts, according (*o*) to which, that space of time will establish a custom, or prescription. It is (*p*) not sufficient that they have sometimes, but must have been constantly paid within the forty years next before the act. If it be demanded how such payment is to be proved? Degge answers, by what has been done all the time of memory *since* the act. Here, then, another important difference is made by the statute between these personal tithes and the two other classes, the former (*q*) not being like predial, or mixt tithes due of common right, but where they have not usually been paid, not being of right demandable.

The two distinct articles above alluded to, as (*r*) perhaps the only species of personal tithes now payable, and which have been judicially referred to this class, are those of mills, and fish.

1. Mills more antient than the ninth year of Edward the Second are (*s*) by a statute then passed, called *articuli cleri*, c. 5. impliedly discharged of tithes. If such mill be rebuilt upon the old foundation, the exemption shall hold good, and revive. But (*t*) if the materials of an old mill are employed in erecting a new one on a different site, though on the same stream; or if such new mill is built on land exempt from tithe, as having belonged to a religious

(*o*) 1 Wms. 663.

(*p*) Degge, p. ii. c. 22.

(*q*) 3 Bul. 212. 1 Rel. 405.
Burn 73.

(*r*)

(*s*) Gwill. 130. n. 982. Ansell v.

Adman; but the St. art. sup chartas, is put by mistake for art. cleri.

(*t*) Gwill. 871. Thomas v. Price, 286. anon. But see Gwill. 355. More v. Russell, that a site discharged by a modus exempts a mill erected thereon,

house,

house, personal tithes are due, that is, the miller must account for and pay to the incumbent where the mill stands, the tenth part of the profits arising from corn, grain, and malt ground over and above all incidental charges; among which rent (*u*) is a principal deduction where the mill is occupied by a lessee; where by the owner, the annual value is to be computed and deducted, and the same is to be done where the proprietor has rebuilt or newly erected a mill, and occupies it himself, as it would be hard on the present incumbent if the whole expences of building were to be deducted out of the first profits. The mode (*x*) of accounting for the profits of mills as for personal tithes, that is, deducting expences, had been previously settled, (though afterwards (*y*) called in question) in a case in the House of Lords (*z*), and is now finally established. By the same case in the House of Lords, as well as by what has been before observed, it appears, that mills newly built pay tithe from the time of their erection; though (*a*) this was contrary to the opinion of the two chief justices, who held no tithe at all was due for such new mills, the same being a personal tithe, and of course wanting the support of custom. But the statute of Edward the Sixth, speaking of personal tithes (*b*) generally, may well be controlled by the former law of Edward the Second, which requires the payment of tithes from newly erected mills *speciatim*, and it is reasonable, that the non-payment, which is to confer the privilege of exemption, should be constructively limited to things previously in existence. It is, therefore, settled by the cases (*c*) referred to, that new mills pay tithe. How-

(*u*) 3 Anst. 913. Gwill. 1460. Carleton v. Brightwell.
Hall v. Machet.

(*a*) Gwill. 598.

(*x*) Vin. Abr. t. Desmes, M. 3.
pl. 5. 1 Br. P. C. 157. Gwill. 596.
Chamberlaine v. Newte.

(*b*) In toto jure generi per speciem derogatur, &c. Elem. Jurispr. 4to. 1783. 36.

(*y*) Gwill. 623. Dodson v. Oliver.

(*c*) Gwill. 871. 1460. 355.

(*z*) 2 Wma. 463. Gwill. 676.

ever,

ever, where the date of a mill's erection is unknown, and no (d) proof is adduced of tithes ever having been paid, the court from such non-payment will presume it to be more ancient than the statute of *articuli cleri*, and so not tithable.

Another point seems long to have remained unsettled, namely, to the incumbent of what parish tithes of mills should be paid, whether where they are situate, or where the occupiers reside. A writer (e), whose fame is perhaps inferior to his merit, determines it to be, where the miller dwells and hears divine service, and (f) this doctrine has one judicial declaration in its favour. But the current of authorities is otherwise, tithes of mills being considered as predial in respect of locality, though properly personal as to the manner of accounting, and the quantum of payment; and (g) it is firmly established, that they belong to the incumbent of the parish where the mill is situated, and the business carried on, which agrees with the old law of France, "*decimæ (b) solvantur illi ecclesiæ ubi molendinum situm est.*" Yet tithes (i) of mills like other personal tithes, are to be accounted and paid for annually at or before the feast of Easter.

The preceding observations relate only to water-mills, or wind-mills for grinding corn, and grain. If (k) such a mill privileged from its real or supposed antiquity is converted into one of a different description, and afterwards reconverted to its pristine use, it shall not lose its exemption, or become tithable as a new mill. But (l) where a modus, or cus-

(d) Gwill. 644. Hughes v. Bel-
linghust.

(e) Wood Inst. 163. 170.

(f) Gwill. 983. Wilson v. Mason.

(g) Gwill. 871. 1256. 1460.

Hill v. Machet, from 3 Anstr. 913.

Gilbert v. Gurney Scacc. acc.

though this matter was not moved.

(b) Rebnffus cited, Gwill. 356.

(i) Stat. 2 & 3 E. 6. c. 13. § 7.

Gwill. 985.

(k) Gwill. 974. Wilson v. Mason.

(l) 3 Atk. 17. Gwill. 782.

Talbot v. May.

tomary payment in lieu of tithes was pleaded to exempt a mill formerly used *in part* for grinding corn, and *in part* as a fulling-mill, but several years before the suit the fulling wheels were removed, and mill stones put in their room, the plea was over-ruled by reason of such innovation, by which it became as it were a double corn mill, a new as well as an old one. In that case it not only appears, that a new mill built on the same stream, is a privileged one, or a fulling-mill converted into a corn-mill shall pay tithe, but that even if new wheels and stones are added to a mill covered by a *modus*, by which the work of two mills may be performed, it is as two mills, and cannot be protected by the former *modus*. In the other case (*m*) just referred to, it was argued, that no mills are tithable but such as grind meal for food of men, or animals, nor then if only for home (*n*) consumption, not for sale; and it was suggested, that those mills only could be intended tithable, which were constructed for purposes in use at the time of passing the statute of *articuli cleri*. These general doctrines, however, were not in that case settled, nor were they involved in the judgment pronounced. But (*o*) it has been holden, that a copper-mill, fulling-mill, (unless (*p*) perhaps by special custom) shaving-mill, glass-house, tin or lead mill, paper mill, or the like, pay no tithe, the profits in such instances arising from the labour and industry of man. The generality of this reason would not only preclude the profits of any manufacture from being tithable, but would also exempt fish, the tithes of which I am about to mention. We must, therefore, I suppose, understand,

(*m*) Gwill 974.

(*n*) No tithe is due where a mill is used only for grinding oats for the owners hounds, Gwill. 1022. Hicks v. Triefe.

(*o*) Lit. 314. 2 Rol. 84. 2 Cro. 523. Gwill. 354. Johnson v. Dand-

ridge. Rolle and Croke both state that a prohibition was granted, and so is R. A. 641. but in the same paragraph of the last book there is a later case with the same names,

contra.

(*p*) 3 Atk. 19.

that

that the machines above enumerated are *prima facie* exempt from paying tithes, but may be subjected to them by shewing a custom for that purpose. Indeed, Easter offerings have been said (q) by a learned judge, to be a compensation for personal tithes, certainly a very inadequate one, for (r), though due of common right, it is at the rate of two-pence only for each parishioner, except where it is customary to pay more.

2. The other species of personal tithes, to which I have just alluded, is that of *fish*. But fish taken (s) either in the sea, or or in a common river, are not tithable, on the principle of their being *fera natura*, unless by special custom. Where the claim is supported by custom, they are generally to be tithed in the same manner as other personal tithes, that is, a tenth of the profits is to be paid after coits deducted. And as tithe is only due by custom, so less (t) than a tenth by custom may be due. On the other hand, where the custom is express for paying tithes of fish in kind, it seems expences are not to be deducted, and so an incumbent or lay impropriator may be entitled to receive a much larger proportion than a tenth of the clear profits in respect to this, though a personal tithe (u). Both these decisions are alike sanctioned by the before mentioned statute 2 & 3 E. 6. c. 13. § 11. by which parishes standing upon

(q) Bun. 174. Gwill. 662.

(r) Bun. 173. 198. Gwill. 661. 662. 889. 3 Burn Eccl. L. 20. Carthew v. Edwards.

(s) Deggo, p. ii. c. 8. 1 R. A. 630. Noy. 108. Holland v. Heale, cited in Williams v. Baron.

(t) The canonists allow this distinction between personal, and real or predial tithes, as to which latter, such a custom cannot be maintained. Ayl. Par. i. can. 508.

(u) Noy. 108. 1 Lev. 179. Sheppard v. Penrose, cited, Gwill. *ibid*. See to the same effect Gwill. 621. Earl Scarborough v. Hunter, which case is differently reported, Bun. 43. and the concluding proposition therein that one tithe may be paid by custom, and one of common right (of fish), seems contrary to all the authorities.

and

and towards the sea coasts, the commodities whereof consist chiefly in fishing, and which have used to satisfy their tithe by fish, shall pay their tithes according to the laudable customs used of antient time within the forty years then last (*x*).

As to the question to what particular church tithes of fish shall belong, it is affirmed by Degge (*y*), to be the custom of South Wales, (and there seems nothing unreasonable that it should prevail elsewhere), “that if the
“parishioner of one parish land his fish in another, the
“tithes are divided between the parson of the parish where
“the fisher lives, and the other where he landed his fish;
“but if the parishioner land his fish in the parish where
“he himself dwells, then the rector of that parish has the
“whole tithes.” Complicated, and circumstantial claims and questions may arise on the subject between incumbents, and impropiators of neighbouring parishes, but unless the custom be explicitly clear, the (*z*) presumption appears to be in favour of the parish where the fisherman dwells.

Not only fish caught in the sea, or a common river, but those (*a*) kept in ponds also (where they may be considered in constant actual possession, and consequently the principle derived from their wild nature may be thought of less weight), when caught, and sold, have been determined not to be tithable without special custom. It was in such case insisted, that they were wild in their nature; and as an additional reason, that they are *quasi* in the realty, and go to the heir; which is equally applicable pigeons in a dovecote; yet (*b*), young pigeons if sold, are

(*x*) 3 Br. P. C. 479. Gwill. 691.
Gwavas v. Kelynack.

(*y*) P. ii. c. 13.

(*z*) Gwill. 931. Williams v. c. 8.

Baron.

(*a*) Gwill. 616. n. 1581. Nicholas
v. Elliott. See Degge, p. ii. c. 8.

(*b*) 1 R. A. 635. Degge, p. ii.

tithable of right without a custom : If (c) used in home consumption they pay no tithe, except (d), perhaps, by special custom. It is to be observed lastly, concerning this tithe of fish, that (e) where they are kept in a pond for the owner's pleasure and home consumption, not sold, or made profit of, no tithe is due, in which case it seems the allegation even of a custom to render them tithable, would not be allowed although it hath been already, and will continue to be seen how materially custom may affect the right to tithes, and augment, or diminish this ecclesiastical revenue.

II. A second (f) division of tithes is into *great* and *small*. Corn and hay universally, (though vicars may be specially entitled to limited portions, and descriptions of these articles), and wood except, so far as local usages prevail to the contrary, are accounted great tithes. All other predial tithes, exclusively of those above specified, and comprehending (g) seeds even of articles which, ripened to maturity, would be great tithes, as well as mixt, and personal tithes in general are ranked in the class of small tithes. It has (h) formerly been thought by some judges, that the distinction of tithes into great, and small might properly enough depend on the quantity. As if a large proportion of a parish were sown with flax, potatoes, or other product, being of the nature of small tithes, that they would by these means be converted into great tithes, and would belong to the rector. But (i) this opinion, has been decisively over-ruled, and it is now clearly understood, that the law denominates, and

(c) Lit. 40. Gwill. 428. Anon. Clarke v. Stapler, 938. Cartwright
Hedl. 27 S. C. Hedl. 147. Flower v. Bailey 1173. Jeremy v. Strangers.
v. Vaughan.

(d) 1 R. A. 642.

(h) 2 Vin. left. 91.

(e) Boh. 151. ed. 1760.

(i) 2 Atk. 364. Gwill. 777.

(f) Degge, p. ii. c. 1.

Smith v. Wyatt, 5 Br. P. C. 586.

(g) Com. R. 633. Gwill. 749.

Gwill. 874. Sims v. Bennett.

Walls v. Pain. Gwill. 889. 926.

adjudges

adjudges tithes to be great, or small according to the intrinsic nature of the thing, not from the quantity, the mode of cultivation, or the use to which they are applied. Such (*k*) predial tithes as are of the nature of small tithes, must be set out pursuant to the statute of Edward the Sixth; as was resolved in the case of apples, and as appears the prevailing opinion in that of wood, but not positively so adjudged.

III. Tithes are sometimes divided into, and treated of as *rectorial* and *vicarial*. But this is a less proper distinction than the two former, not being like them founded on the nature of the tithable matters themselves, but varying according to particular endowments and local usages, that being in most places a rectorial, which in some comparatively few others is a vicarial tithe.

I proceed therefore to the second proposed head of this Chapter, namely, the legal questions, and controversies, which may arise between rectors, and vicars; a subject closely connected with the division of tithes into great, and small.

In a learned work (*l*) some remarks are made concerning the origin, and endowments of vicarages; a more exact account of which as to some points, may be collected from a case (*m*) reported at large by one of our earliest and best compilers, whence it appears, that appropriations were originally made to none but but spiritual corporations sole, as a dean or abbot, who (*n*), thereupon, were formerly reputed to have the cure of souls as common incumbents have, and as the latter are parsons for life, the former and his successors became parsons for ever. Afterwards, and

(*k*) Gwill. 430. 1. Norton v. vicars in the same church at this day, see Gibf. Cod. t. xxx. c. 13. Clarke.

(*l*) 1 Vin. left. 315.

(*m*) Grendon v. Bishop of Lincoln, 3 Com. d. 152. ft. 42. G. 3. c. 84. pl. 493. Gwill. 136. § 12.

(*n*) As to spiritual rectors and

very frequently, appropriations were made to spiritual corporations aggregate; who could not collectively in the parish-church say divine service, nor minister the sacraments, and then it became necessary for those purposes, to substitute a vicar competently (o) endowed. From this source, and the subsequent dissolution of the religious houses, the antient possessors, arose the great number of impropriate rectories at present in lay hands. The parties, whose consent was supposed requisite to forming appropriations, were the patron, the bishop, and the king as king, (I mean independently of his now acknowledged ecclesiastical supremacy), and as king contingently entitled to escheats, and to presentations by lapse, which contingent rights were annulled by appropriations. But sometimes the pope, claiming to be supreme ordinary, superseded the necessity of the bishop's concurrence; and such authority as the Roman Pontiff used to exercise, is now by divers statutes transferred to the king (p); who may therefore create *de novo*, and vest appropriations in (q) in spiritual corporations, having succession by consent of the patron, or where he is himself patron without the agency of the bishop: but it is a prerogative not very likely to be called into exertion.

When (r) a vicarage hath long continued, an endowment, although no instrument thereof be shewn, shall be presumed; and the validity of the appropriation shall not now be defeated from that imputed defect.

The most common mode of endowment of vicarages on appropriation, has been by allotting the small tithes to that use, leaving the great tithes for the rector. Sometimes a

(o) 1 Vin. left. 315-6.

Gwill. *ibid.* where there is a profusion of learning on the subject.

(p) Adam v. Tothill, Gwill. 436-467.

(r) 12 Co. 4. Gwill. 158. Grymes v. Smith.

(q) Qy. If to lay corporations,

vicar has, by a more special endowment, a described portion of the great tithes also, or of the glebe; and (s) sometimes he is in part, or wholly provided for by a determinate annual sum of money.

Of the dissolution of vicarages, the work (t) above referred to, has shortly treated, and here it is necessary merely to observe, that a (u) vicarage once endowed, is not reunited to the rectory by non-presentation of a vicar for a long series of years; but the new vicar presented by lapse, becomes entitled to the tithes included in the endowment.

No (w) tithes belong *de jure* by original right to the vicar, but only derivatively under an endowment, or by virtue of a prescription, which supposes an endowment, by one of which tithes must be established in proof. It is (x) laid down that the original endowment cannot be prescribed against by the parson. And there is a (y) case transmitted to us by several reporters, where the vicar being entitled to small tithes generally, a customary payment to the (z) impropriator in lieu of the tithe of hops, being a species of small tithes, was not allowed to operate in defeasance of the vicarial claim. But this seems contradicted by (a)

(s) See Gwill. 1090. in *Lloyd v. Mortimer*.

(t) 1 Vin. lect. 320. &c.

(u) 1 Cro. 873. Gwill 221. *Robinson v. Bedel*. Where it is said, the not presenting is the default of the parson himself. It is true, that the impropriator is the regular and original patron. 1 Vin. lect. 317. but the impropriation and advowson may subsequently get into distinct hands by a separate conveyance of one or both of them. Gwill. 1128. *Devie v. L. Brownlow*.

(w) Pal. 426. Str. 87. Yel. 86. Gwill. 226. *Greene v. Austen*.

x Gibf. cod. 720. cites *Pringe v. Child*, 2 L. 1.

(y) Gwill. 522. *Rifden v. Crouch*.

(z) 2 Kel. 612.

(a) 1 Mod. 216. Arg. in *Bennet v. Read*. Gwill. 1276. *ibid.* 1335.

Ellis v. Saul, from 1 Anstr. 332.

And vice versa payment of the modus to the vicar is a good exemption against the impropriator. Bunb. 180.

Gwill. 653. *Woodnooth v. Lord Cobham*.

other, and more recent authorities; according to which, a modus or customary payment to the rector is a good bar to the vicar. For all tithes, great and small, belonged originally to the rector, who, though (*b*) not a necessary party to appropriations made when the church is full to take place upon avoidance, has yet been considered argumentatively and in the abstract, as the endower of the vicarage, that being derived out of the entire rectory; and the vicarage, therefore, has been supposed more recent than the customary payment, which is always taken to be of immemorial antiquity; consequently, as to the small tithes in particular covered by the modus, the rector at the time of the endowment had not them *in specie* to bestow: besides, that the parishioners have an interest and claim to establish the custom of the modus. On the other hand, where (*c*) a lay impropriator claimed tithe of hay under a grant, which expressly mentioned it in the third year of James the First, but several instances were shewn of moduses or customary payments made to the vicar by parishioners, who had no tithable ground but meadow, this tithe was presumed to belong to the vicar, and to be covered by such immemorial payments not having been received by any impropriator for one hundred and twenty years, which had elapsed since the grant,

And farther in favour of vicars (*d*), prescription may either supply the loss, and stand in the place of the original endowment where none appears; or where such instrument is produced, may operate in addition to what is therein expressed. Thus, in (*e*) case no endowment is forthcoming, but the vicar hath been used to receive such small

(*b*) Gwill. 146.

(*c*) Bunb. 262. Gwill. 675. Stone v. Rideant.

(*d*) Gibb. cod. 720.

(*e*) Gwill. 1232. Jackson v. Walker, *ibid.* 1248. Payne v. Powlett, *ibid.* 471, 2.

tithes as have in fact arisen, it shall be presumed, that he was endowed of all small tithes arising and to arise; and this presumption will entitle him to the tithe of new tithable matters of modern introduction, as virtually comprised within the endowment. On the other hand, where (f) an instrument of endowment is produced, and where the vicar has used from time immemorial, or for a long space to take particular tithes, he shall not be concluded by their not being expressed in such instrument; but it shall be intended, that the tithes so constantly received, were added to the vicarage by some (g) antient and lawful, or voluntary (b) augmentation.

Where endowment is expressed in words of ambiguous signification, usage must fix the construction. Thus, the word "*garbæ*" (which (i) has been variously understood, but properly means grain, or fruits of the earth bound up in sheaves), has (k) been determined to comprehend the tithe of hay or otherwise, and in favour of, or against the vicar according as the custom has differently prevailed. So (l) also the words "*altaragium, et minutæ decimæ*," (the former of which is very frequent in endowments) may, by reason of, and in conformity to antient and established usage, give a right to tithe wood to the vicar, though this *de jure* is a species of great tithes. Endowment, (m) or prescription which presupposes one, are as we have before seen necessary to entitle the vicar to any species of tithes. But it hath been judicially (n) declared, that when the vicar

(f) Hard. 328. Gwill. 514.
Twiss v. Brazenose, Coll.

(g) See 1. Vin. lect. 318.

(b) Perhaps not unfrequently;
the same vicarage repeatedly so augmented. in Devie v. Lord Brownlow.
Gwill. 1128.

(i) Gwill. 882, 3, 4, 8. 1157.

(k) 1 Cro. 633. Gwill. 207. Barfdale v. Smith. Gwill. 1244. Oglander v. Lord Pomfret.

(l) Degge, p. ii. c. 1. 2 Bul. 27.
Gwill. 1573. Reynolds v. Greene.

(m) Gwill. 1528. Awdry v. Smallcombe.

(n) *Ibid.*

produces an endowment, then the situation of the parties is reversed, the *prima facie* title to the extent of the endowment is in favour of the vicar, and if the rector would claim any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him. In such case it is incumbent on the rector to give such clear and cogent evidence of a usage in the parish in his favour, with respect to the articles he would insist upon, as shall narrow the terms of the endowment, and induce a presumption that the parties interested in the tithes had come to some new agreement: that some different arrangement had been made with respect to the distribution of the tithes between the date of the instrument (o), and the disabling statute of Queen Elizabeth. An instance of such attempt being made on the part of a rector occurred, where (p) competent proof having been exhibited of an endowment of the small tithes generally, accompanied by some slight and imperfect testimony of actual payment of them; on the other side there was produced written evidence of the vicar's being entitled only to a house, a close, and a small annual pension, which precise sum, indeed, it did not appear he had ever submitted to receive; the court referred it to the decision of a jury, whether the vicar was intitled to all small tithes. This case, and (q) another a few years preceding it, appear to confirm the position that an endowment is not conclusive evidence of a vicar's rights, but that a variation may lawfully be made in it by new agreements confirmed by usage. In (r) another case, an issue having been directed to ascertain whether a specified parcel of lands usually paid tithes to the vicar of A. or to the rector of B. (who was

(o) 2 Bl.—Comm. 320, 1.

(p) Gwill. 1258. Carr v. Heaton.

(q) Gwill. 1168. Fynes v. Or-

dayne.

(r) Bunb. 87. Gwill. 627. Fox v. Ruddy.

not a party to the suit), the jury found it had paid tithe to neither, but lay within the parish of A. ; the court resolved, that the vicar being endowed of all small tithes within the parish, though (s) they have never been paid, has the same right to all within his endowment without usage, unless usage to the contrary be shewn, as the rector has of common right, and decreed for the vicar accordingly. Indeed, the court has peremptorily decided upon the construction of an endowment without any intervention of a jury, namely, (t) where a vicarage was endowed with the third part of the tithes of a manor, it was resolved, that the vicar should have tithes as well of the freeholds, as of the demesnes, and copyholds. But (as may frequently be the case) where (u) intricate questions arise between an impropiator, and vicar concerning the effect of endowments, and grants of augmentation, or concerning boundaries, and local situation, matters involved in the mists of antiquity, and obscured by the changes of time effectuated by drainages, inclosures, or the like, the court has usually remitted the solution of these difficulties in the shape of properly framed issues to the investigation of a jury, on some occasions aided by a formal *view* of the premises ; without which approved mode of examination in controversies of this nature, the vicar's right, at least unless very clear and satisfactory, ought not to be acted upon by a court of equity.

It has been (w) determined, that if a vicar is endowed generally of part of the glebe of the parsonage, he shall not pay tithes to the parson, *quia decimas ecclesia ecclesiae reddere non debet*. The (x) great tithes of such glebe belong to the

(s) Gwill. 1168. *Fynes v. Or- Brownlow.*
dayno.

(t) Gwill. 470. *Walrick v.*
(u) Ow. 58. 1 Cro. 462. Gwill. Cropton. Ibid. 537. *Sanders v.*
1568. *Higham v. Best.* Ryall.

(v) Gwill. 1128. *Devie v. Lord* (x) Ibid,

vicar, although not entitled to any other great tithes within the parish, and to the vicar for the time being; inasmuch, that if a vicar so circumstanced demises his portion of glebe, which is sown with corn, and then dies, the next vicar shall have the tithe of the corn, and not the impropriator; on the other hand, if the (y) endowment is special, namely, that the vicar shall have so much of the glebe, paying tithes thereof to the parson, such stipulation must prevail; and constant payment of tithes to the parson by the vicar will be evidence to a jury, that this was in fact the condition of the endowment, in case the original instrument thereof is not to be found. Under (z) an endowment of small tithes generally, a vicar is not entitled to the small tithes of the parson's glebe, but if the endowment includes the small tithes of such glebe by express nomination, the parson himself shall pay them to the vicar.

There are in some parts what are called (a) *parochial chapelries* or *perpetual curacies*, of a nature distinct from mere chapels of ease, attributed in general to a presumed union of parishes, whence one has subsequently been considered as the consolidated parish church, and the presentation to it has been *cum capellâ annexâ*. These words may, indeed, confer on such presentee when in full possession, the power of nomination to the curacy, but they also import the foundation of a chapel having substantive rights of its own. And the same may be farther evidenced by the accustomed solemnization of baptism, and sepulture within the precincts; or by establishing in proof a prescription exempting the dwellers within the chapelry from contributing to the repairs of the supposed mother-church. Such per-

(y) Gwill. 470. Walrick v. Crop- Blincoc v. Barkdale.
ton.

(z) 1 Cro. 578. Gwill. 197. (a) 2 Ves. 425. Attorney Ge-
neral v. Bereton.

petual curate, except in being nominated instead of presented, instituted, and inducted to his chapelry, differs but little from a common vicar, and is (*b*) capable of holding tithes; but *capable* only, and must like a vicar prove his claim. For here, the rule may be thought to have peculiar force, that without due proof to the contrary, the rector is entitled to all the tithes great, and small within the parish.

Sometimes the controversy between a rector and vicar is confined to the simple question, whether the tithes in dispute are great, or small.

I have already given a general description of small tithes, and have observed, that seeds, while remaining in that state, are so classed, though the produce from them when come to maturity, may form a species of great tithes; thus clover seed is of the former, and clover hay of the latter denomination. The following productions (some of them after much controversy) have been judicially ranked among small tithes, and when a vicar is endowed with small tithes generally, by such endowment belong to him. 1. All (*c*) manner of garden herbs, roots, and fruit; 2. The valuable article of hops (*d*); 3. Potatoes, (*e*) though sown in large

(*b*) Gwill. 1345. *Tamberlain v. Humphrey*. The sta. 31 G. 2. c. 13. for the cultivation of madder, directs the appointed pecuniary payment to be made to every parson, vicar, *curate*, or impropriator. In the case *Bunb.* 273. Gwill. 677. *Price v. Pratt*, the plaintiff, though calling himself perpetual curate of an endowed chapel, seems in truth to have been much in the situation of an ordinary curate; the supposed endowment being recent instruments from the late and present vicar, to

in such vicar's and his own name, and the appointment, though nominally for life being revocable in its nature, he was therefore adjudged not to have such a permanent interest as to enable him to maintain the suit.

(*c*) Degge, p. ii. c. 1.

(*d*) *Hut.* 78. cant. but see Gwill. 522. *Rifden v. Crouch*; *ibid.* 1539. 1557. in *Knighon v. Halfey*, Com. R. 638.

(*e*) 2 Atk. 364. Gwill. 777. *Smith v. Wyatt*.

spe for tithes within the chapelry

quantities,

quantities, which, as we have before seen, does not alter the nature of the tithe; 4. Turnips (*f*) as it seems by the like analogy; 5. Saffron (*g*), though sown in a field which before produced corn, and then yielded tithe to the parson: And *e converso*, where a vicar is entitled to the tithe of hay, if a meadow is changed into arable, the rector shall have the tithe; 6. Coleseed (*h*) reaped from several acres; 7. Teazels (*i*) (a plant used by clothiers), though from their first introduction into the parish, the tithe thereof had uninterruptedly been paid to the impropriator; and lastly (*k*) wood, like most of the preceding, an article of considerable value, and expensive culture. On the other hand, tarts (*l*) cut green, or harvested, and made into dry and winter fodder, have been adjudged as great tithes to belong to the impropriator, or his lessee, because as it seems they are of the nature of hay. As to peas and beans, in a case in which a (*m*) vicar was by *custom* intitled to tithes of those articles planted and managed in a gardenlike manner, or to a composition in lieu of such tithes, his right was allowed to prevail. But this determination rests upon the ground of prescriptive usage: Without (*n*) a special endowment, or prescription regularly and properly proved, tithes of peas and beans, however, or wherever cultivated, are great tithes, and belong to the rector, or impropriator, and they may be included under the term "*decimæ garbarum*;" it being sup-

(*f*) 3 Burn, eccl. l. 438. Gwill. 944. Beaumont v. Shilcot, bill by vicar.

(*g*) 1 Cro. 467. Gwill, 166, Beddingfield v. Feak.

(*h*) Gwill. 533. Fish v. Wimberley.

(*i*) Gwill. 564. 5. n. Hunt v. Codrington.

(*k*) Degge, p. ii. c. 1. Gwill. 428. Norton v. Clarke, 3 Cro. 28, Hutt 77. Udall v. Tindall.

(*l*) Gwill. 742. 3. Steers v. Brasher, where indeed the vicar claimed tithes of hay, but entered into no proof, *ibid.* n. Hodgson v. Smith.

(*m*) 2 Br. R. C. 31 Gwill. 615. Auston v. Nicholas.

(*n*) Grumley v. Burt, Bunb, 169. Stephens v. Martin, there cited. Gwill. 649. 656. Sims v. Bennett, Gwill, 874.

posed

posed that they were actually *garbed*, or bound in sheaves when the word "*garba*" was introduced into the canon law; since which time barley, oats, and peas have not been *garbed*; although wheat continues to be so, because the straw is of value, and it is of importance to preserve it unbroken.

In corroboration of the true distinction depending on the nature, and not the quantity, or the locality of the things tithable, Lord Hardwicke C. in a case before him (o) declared, that if this sort of roots, namely, potatoes, should be called small tithes when planted in gardens, and great when planted in fields, it would introduce the utmost confusion, and must vary in every year in every parish. Therefore wheat (p), or corn sown in a garden or orchard does not lose its genuine and intrinsic quality, but continues a species of great tithes belonging to the rector, and not to the vicar.

(o) 2 Atk. 365.

(p) Mo. 909.

CHAPTER THE FOURTH.

Things tithable of common right, and the manner of tithing them respectively.

IT must (a) not be inferred from the terms of the definition in the beginning of the Second Chapter, that "tithes are the tenth part of the encrease yearly arising from the profits of lands, &c." that this necessity of annual renewal is strictly and universally true of all species even of predial tithes. To mixt, and personal tithes, that part of the description does not at all apply. Indeed, if land hath once borne this annual burden, the principle is, that it ought not to be again charged in the course of the same year. But lands sown with clover (b), which hath a more frequent encrease than once a year, ought, it seems, to pay tithe as often as the product is renewed. So tithe has been decreed to be paid for a second crop of turnips (c), though it was insisted they were sown for meliorating the soil against the next year's crop. On the other hand, it (d) was very early considered as no objection against the tithable capacity of *fylva cadua*, or wood used to be cut, or lopped, that it was not renewed annually. In like manner, saffron (e) is tithable, though generally gathered but once in three years.

(a) 2 Vin. lect. 97.

(b) 3 Burn. eccl. l. 377. Gwill. 584. Witherington v. Harris.

(c) Gwill. 606. Hall v. Fitz.

(d) Gwill. 9. A. D. 1814. 7 R. 2. Because it is an ordinary stated

renewal like the case of *saffron*, Gwill. 838. in *Walton v. Tryon*, but as to the entry, 7 R. 2. see its authenticity questioned, *ibid* 831. 2.

(e) Wood. inst. l. Engl. 172. ed. 1763.

Of (f) common right tithes of *aftermath*, or an after-crop of grafs mown from land before mown in the same year, where there is no prescription or custom against, or in discharge of the claim, ought to be set forth and paid. For otherwise there would be left open a dangerous opportunity of defrauding the rector. But the (g) occupier of land is not bound to make into hay the tithe of the grafs, which he cuts. And, therefore, a (h) prescription that the occupiers of meadow ground within the parish, have used to make the first vesture into hay, and pay the tenth cock in satisfaction of the tithe of such first vesture, and also of the aftermath has been adjudged a good and legal prescription, and discharge of the tithe of the aftermath. So a man (i) prescribed where the grafs grew in wet places, that in consideration of his carrying it out of such watery ground and to another drier spot, to make it into hay, he was to be discharged from the tithes of the aftermath, and this prescription was also allowed to prevail. In another (k) case, where in order to stay a suit in the spiritual court for the of the latter-math of clover-grafs, a custom was suggested, that every person having any meadow, or farm within the parish in which any has been gotten or arisen, hath been used and accustomed to make the first math or tonsure of the grafs into cocks of equal quantities at his own costs and charges, and to set out the tenth cock for tithes for the vicar in full satisfaction of all and singular the tithes, as well of the former as of the latter mowing, and that the vicars of that parish have always from time immemorial accepted

(f) 1 R. A. 640. Gwill. 531. 473. Johnson v. Awbrey, Boh. 55, 56. ed. 1760. 1 R. A. 648.

Margetts v. Butcher, see 8 Vin. abr. 574. Wood inst. 165. 3 Burn eccl. l. 415.

(i) Gwill. 477. in Andrews v. Lane.

(g) 1 R. A. 664. 2 Wms. 522. 3. in Fox v. Ayde.

(k) Lut. 1071. Gwill. 571. Durant v. Booty.

(h) Mo. 910. 1 Cro. 660. Gwill.

and

and taken the said tenth cock accordingly ; it seems to have been thought a good custom as laid, and no difference was made between the latter-math of clover-grass, and ordinary grass: But *exceptio probat regulam*, and the instances alleged are variations from the general doctrine, that without some special custom or prescription to the contrary, not (*l*) unreasonable in itself, aftermath is tithable.

On the other hand, for after-pasture no tithe is due, that is the occupier of grounds which have paid the tithe of hay is discharged of common right from the tithe of agistment of the same land in the same year, because here the principle prevails, that one and the same land shall answer but one tithe for one year. On this point the (*m*) authorities are very numerous, in some of which the rule is laid down as well as to stubble-land which had paid tithes of corn, and was afterwards in the same year depastured by cattle, as fields from which hay had been mown. For this course or practice of after pasture is not so open to fraud as that of aftermath. Neither does it impoverish the land agisted after its being cropped, and tithed. There is, therefore, a manifest difference between the cases. If (*n*) however there really was any fraud in the matter, and from a sinister view more grass was left by the scythe in the mowing than is usual, then it is reasonable that tithes should be paid for such after eatage, or agistment.³

Farther, tithe (*o*) shall be paid of the hay produced from orchards, though the fruit grown in them was tithed the

(*l*) 2 Bull. 239.

(*m*) Yel. 86. Gwill. 226. Greene v. Austen, Bunb. 7. Gwill. 613. Ayd v Flower, Bunb. 78. Gwill. 629. Franklyn v. Maister, &c. of St. Cross, Gwill. 779. Chapman v.

Keep, Gwill. 1335. in Ellis v. Saul, from 1 Anstr 332.

(*n*) Boh. 57. cites 2 Bul. 238. not in point.

(*o*) Degge, p. ii. c. 3. 2 Inst. 652.

same

same year as apples, pears, cherries, or the like. And if such orchards are sown with any kind of grain, the corn shall be tithed. For the hay, corn, and grain are species distinct from the fruit.

I shall take this opportunity of mentioning also, that if a man sell his grafts before it is cut down, the vendee thus commencing owner of it, and not the vendor, must discharge the tithe. The same (*p*) rule prevails as to nursery-plants, and corn; if they are sold standing, the vendee must pay the tithe, but if the owner pulls up the plants and sells them, or if he sells the corn after severance, such vendor is liable to this duty. So likewise where (*q*) a man fold the (*r*) toppings and loppings of oak, ash, and elm standing and uncut, the vendee cut them, and the parson sued the vendor for tithes; the suit as against the latter was dismissed. But the vendor (*s*) of wood cut by himself, and fold for fuel, is the party to be charged. In the same manner if a (*t*) parishioner severs his grafts and makes it into reeks or cocks, and then sells it, no suit can be maintained against the vendee for the tithes.

After the preceding remarks in regard to predial tithes becoming due once a year, with the specified exceptions to that rule, and as to the respective situations of vendor or vendee touching the above matter, (considerations which seemed not wholly inapposite in this place), I proceed to the general subject of this chapter, namely, things tithable of common right. The principal of these are :

- (*p*) Hard. 380. Gwill. 515. Grant v. Hedding. ing the statute of *Sylos Cadua*, which usage an issue was directed to try.
 (*q*) Gwill. 537. Tafwell v. Athill.
 (*r*) Which it is there said are not tithable without a custom, but may be so by usage notwithstanding
 (*s*) 1 R. A. 656. Ellis v. Drake.
 (*t*) 2 Rel. R. 78. Carmen's case.

I. *Corn and grain.* These, and other predial tithes are by statute 2 and 3 Ed. VI. c. 13. required to be truly and justly without fraud or guile divided, *set out*, yielded, and paid: and no person is allowed to take or carry away the same before he hath justly divided or set forth for the tithe the tenth part thereof, or otherwise agreed for the same with the parson, vicar, or other owner or farmer of the same tithes, under the pain of forfeiture of treble the value of the tithes so taken away: and whensoever the said *predial* tithes shall be due, and at the tithing time thereof, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, *to view and see* their said tithes to be justly and truly set forth, and severed from the nine parts, and the same quietly and undisturbedly to take, and carry away. Here it may be first observed, that a custom or prescription of tithing without the parson's view of the proceeding, or of the nine parts from which the tenth is severed, is void: as was (u) determined in respect to fleeces of wool, a species of mixt tithes; it being insisted to be against common reason, that any man should judge or divide for himself, and then take choice of his own division; for the truth of the tenth depends upon the proportion it holds with the nine parts, and therefore, for the parishioner who is in the nature of an adversary to the parson in this case, to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he thinks proper, and the prescription were as reasonable as to say plainly that he might set out what tithe he pleases. In regard to tithes denominated predial, of which I am now speaking, the reasoning as well as the words of the statute, pleads more strongly against the validity of such a custom or prescription as I have just mentioned. But on

(u) Hob. 107. Gwill. 279. Wilson v. bishop of Carlisle.

the other hand, there is (w) by the general law no necessity for giving notice of the setting out of tithes as hath been repeatedly adjudged, though alledged to be otherwise by the law ecclesiastical. In the last of these adjudged cases it was argued at the bar, that as to the view the statute was introductory of a new law; which tends to shew, that at the setting out of other than predial tithes, the parson has still no authority to be present; but I cannot think that the common law excludes him from inspecting a transaction in which he is so immediately interested, when he happens to be acquainted with the time of its taking place, and chooses to attend. Indeed we have just seen, that even a special custom to such effect is void, and though notice of a parishioner's intended time of setting out the predial tithes is not necessary generally, it (x) may be specially requisite by virtue of a local custom for that purpose, such custom having been adjudged good and binding, and (as the chief justice thought) so intrinsically proper, that very slight evidence would be sufficient to prove it. Where (y) such custom prevails, an hour's notice is insufficient. The rector has other functions to attend to, which may detain him at the opposite extremity of the parish. The notice should be such as to give him time to inspect the setting out of the tithes, and to see that he is not defrauded of his dues. The custom relied on must, however, be positively alleged. For (z) where the lessee of an impropiator brought his bill for tithes of wheat, and other grain, and stated, that by the custom in that parish, the occupiers ought to give notice to the person intitled to the tithes of

(w) Noy. 19. Spencer's case, 1 R.A. 643. Chafev. Ware, 2 Vent. 48. Anon. Com. R. 22. Gwill. 1579. Gale v. Ewer. But Sty. 342. cited in some of these books does not support this point. (x) Burr. 1891. Gwill. 928. But-
ter v. Heathby. (y) 3 Anstr. 640. Gwill. 1438. Tennant v. Stubbing. (z) Bunb. 333. Gwill. 739. Beaver
v. Spratley.

setting forth the same, *or there was some other custom of the like nature*, and that the defendant had not given notice, and prayed an account, two objections were raised: First, the unreasonableness of the custom was insisted on, for the person intitled might live a hundred miles out of the parish; but to this it was answered, that notice to the servant would be good in that case: Secondly, it was objected, that the custom was alleged too uncertainly, to which it was answered, that the suit was ~~not~~ to establish a custom when greater certainty is required, because it is to be the foundation of an issue, which is generally directed before a court of equity establishes a custom; but here the custom is only brought forward as an inducement, or introductory title to the demand of an account. But the whole court held this want of certainty to be a fatal objection to the custom as alleged, which being the foundation of the plaintiff's demand, they could not decree an account without first establishing the custom, and the bill was dismissed with costs.

It has been (a) determined to be no excuse for not setting out tithes of corn, that the late occupier's interest in the land was expired at the time of his carrying the corn away. For although his interest in the land were expired, he remained owner of the corn, and if corn be cut down, and a stranger (b) take it away, before severance of the tenth part from the nine parts, yet an action on the statute will lie against him. And (c) if a parson or impropriator of a rectory sows land in his occupation, and sells the corn standing, the vendee, if he has not special words of discharge, must set out and pay tithes of such corn to his own

(a) 2 Cro 324. 1 Brownl. 123. C. J. 2 Rol. R. 440. in Gwyn v. Gwill. 258. Kipping v. Swayn. Merryweather.

(b) The trespasser to be sued, (c) 2 Cro. 361. Gwill. 276. Brownl. *ibid.* marg. and per Ley Moyle v. Ewer.

vendor,

vendor, and the carrying away of such corn without setting out the tithes of it, is an offence within this statute. But the (d) parson cannot justify his coming to set out tithes without the consent of the owner.

This setting out of the tithes is indispenfable. On no pretence is the corn to be removed from the field where it grew, till that is duly performed. For (e) where a defendant by his answer alleged, that after cutting his corn, the fences being bad, he removed the whole crop into the adjoining field for greater security, and then (after notice given in church), he tithed it, and no one coming to receive the tithe, he took care of it for four or five days, after which such tithe perished on the ground, and farther insisted, that such removal was not done with any fraudulent design, still the court on the hearing was of opinion, that the removal was unlawful, and decreed him to account. This decision, I presume, was founded upon the danger in any instance of countenancing such a practice, and the necessity of adhering to a settled principle on so important an occasion. The same principle seems to have governed the determination in a mere recent (f) case. A bill was filed for tithes of wheat, which had been left standing very long from the wetness of the season. The farmer gave notice to the parson, that he was going to cut and carry what he could while the weather was fair: The latter attended, and the defendant proceeded to fill a cart-load, throwing nine sheaves into the cart, and laying aside the tenth sheath for the tithes, which the plaintiff refused to take, unless he saw the whole tithes regularly set out before any part should be carried away: He did not object to the size of the sheaves allotted him, and they were sworn to be

(d) 1 Freem. 335. Gwill. 562.
Anon.

(f) 3 Anstr. 682. Gwill. 1441.
Franklyn v. Gooch.

(e) Gwill. 796. Thomas v. Rees.

equal to the others. It was urged, that here the omission of the usual form was justified by the emergency, and that the farmer need not adopt an unprofitable mode of husbandry for the purposes of tithing. But the court held, that the conduct of the farmer in not setting out the tithes, was not strictly correct, and could not be supported, and that an account was thereof unavoidably to be decreed, but they decreed it without costs, thinking the plaintiff's case unfavourable. Neither, as it seems (*g*), can this practice of throwing nine sheaves into the farmer's cart, leaving the tenth for the parson without previously setting out, and exposing to view the whole number in the field where the corn grew be justified, even by alleging, and proving that such mode of tithing is conformable to the local *custom* of the parish. In another (*b*) case the customary mode of tithing stated in the answer, differed not materially, if at all, from the (*i*) common law mode (as it was called) of tithing wheat by sheaves, and was allowed to be good where that practice has obtained. But the custom as proved appeared to be, to make up the sheaves into shocks or threaves, in the size of which uniformity was not regarded, and that the tithes were never set out till each tenth sheaf came to the fork, and was thrown aside for the rector, he having no other election, or opportunity of judging of the fairness of his tithes, except by rejecting the tenth sheaf when about to be thrown aside for him, and taking the eleventh. It was insisted that this mode was illegal, it being essential that the parson should have an opportunity of seeing the tithes separated from the other nine parts, so as to compare the one with the other. Whether they are set out in shocks or sheaves, if the tithes are regularly set apart, he can see whether he

(*g*) Bunb. 186. Gwill. 658. Bough- Tennant v. Stubbing.
ton v. Wright.

(*i*) Ibid 1440.

(*b*) 3 Anstr. 640. Gwill. 1438.

has his proper proportion in number and dimensions. But in the present instance where the tithes are to be taken in the sheaves, and all the ten parts are put by the former into unequal shocks, the rector can neither compare the size of his sheaves with the others, nor can he calculate the number to which he will be entitled. Conformably to this reasoning, the court pronounced its judgment that the custom proved of the farmer's putting the sheaves into shocks, of uncertain and unequal magnitude, was highly prejudicial to the tithe-owner, unreasonable, and therefore void; as it deprived such tithe-owner of an advantage, which the law always gives him of having the tithes so set out, that he may compare them with the other parts.

Moreover, the (*k*) setting out of tithes, though originally unexceptionable, may be construed a fraudulent severance by reason of the subsequent conduct of the occupier of the land; as if after taking away his nine parts, he turns his cattle into the ground, which destroy and consume the tithe; this seems within the coercion of the statute, if the person intitled to the tithe is not allowed a reasonable space of time for carrying it away. Indeed (*l*) after tithes are set out, the tithe-owner hath a liberty for a time convenient to come and carry them away, and this convenience of time is triable by a jury. If he (*m*) neglects so to do beyond a reasonable time, the occupier of the land where the tithes are left may at his election, either *distrain* the tithes as *damage feasant*, that is, interrupting the beneficial uses of pasturage and agriculture; or he may seek redress by *action*. But (*n*), though the tithe-owner has notice of the tithes being set out, and still neglects

(*k*) Per Holt.(*m*) 8 Term. R. 72. Gwill. 1608.(*l*) Per Jones J. in Mountford v. Williams v. Ladner.

Sidley, 3 Bullst. 336. Gwill. 425.

(*n*) Ibid.

beyond a reasonable time to remove them, yet the occupier of the land cannot justify the turning in of his cattle where the tithes are, to depasture there, in the usual course of husbandry, by which means the corn and grain set out for tithes are eaten, or damaged. This is a matter of universal concern. The property in the tithe after it is set out is completely vested in the rector, or other proprietor, who must have a remedy for the destruction of such his property. As to the injury and inconvenience sustained by the farmer by the tithes being wrongfully left incumbering his ground, he must avail himself of one or other of the (o) legal remedies before-mentioned. On this point there have been repeated adjudications, in the last of which it was observed, that precedents inculcating the principle that a party should apply to the law rather than take the law into his own hands, ought to be adhered to in courts of justice.

The mode of tithing wheat by the tenth sheaf hath been already referred to, as prescribed by the common law. This is alledged to be the regular (p) legal course; and that if it be by the tenth stick, stook, or shock, it is by custom. It was formerly thought that the (q) custom of the place might still farther influence the manner of tithing it, as if the (r) custom had been to measure out the tenth part of the corn growing on the lands, it has been urged to be a good custom; but this seems contradicted by more recent authority (s). Of (t) common right, however, the owner of the corn ought to cut down and prepare the same, and to make it

(o) The form of action to be brought against the parson for not taking away his tithes, is an action upon the case, and not trespass *vi et armis*, because it is but a non-feasance, 1 Ld. Raym. 188. Shapcott v. Mugford.

(p) Gwill. 961. 967. in Erskine

v. Ruffle divers cases cited.

(q) Godolph. rep. can. 393. Degge, p. ii. c. 3.

(r) Degge, p. ii. c. 3.

(s) Gwill. 1561. Knight v. Halsey.

(t) Watf. c. xlix. fol. 436.

into

into sheaves, cocks, or shocks ; but the tithes being set forth, the farmer is not bound to watch, or look after them till the parson carries them away. If a (*u*) man prescribe to pay certain sheaves of corn for all tithes of corn, it is not a good prescription, for he ought to make it into sheaves, and part of his duty in kind cannot be a satisfaction of the residue.

But if according to the usage, the parishioner is to assume any additional trouble beyond the general line of his duty, it may possibly be otherwise. As (*w*) where the parishioners were at the charge, besides binding the corn into sheaves of making them into shocks, and then setting apart the tithes, and by virtue thereof, claimed to be discharged of tithes for the odd sheaves, which would not make a shock or stack, the custom was adjudged good as being founded on the valid consideration of the parishioners doing more than of common right they ought. The principle (*x*) seems not unreasonable, and the doctrine is adopted by Watson (*y*) and Burn (*z*). But it may be questioned, whether its authority is not over-ruled, or at least shaken by the following more recent (*a*) determination. The defendants to a tithe bill insisted on an immemorial custom to set up their corn and grain in *sticks*, being twelve sheaves placed in a row six against six ; or in *stitches*, being ten sheaves placed in a row five against five, and that if there happened upon the whole quantity of corn to be any stick or sticks, stitch or stitches, not amounting to ten, no tithe was paid of such under that number : The court declared the custom void, and therefore ordered the defendants to pay tithes

(*u*) 1 Rol. R. 173.

(*w*) Latch. 226. Anon. Gwill. 9667. in Erskine v. Ruffle.

(*x*) Recognised, Gwill. 967. 8. Woodshaw v. Hill, cited in Erskine

v. Ruffle.

(*y*) C. xlix. fol. 436.

(*z*) 3 Eccl. l. 408.

(*a*) Gwill. 565. Trewin v. Bond.

of all wheat, barley, and other corn, particularly for the tenth part of all the odd sticks or stiches of wheat, barley, or other corn, not amounting to the number of ten. The reasons on which the court proceeded do not appear, and we may observe some distinctions between the cases; for besides, that in the latter the custom is laid with some uncertainty, it makes a very material difference to the tithe-owner, whether the odd sticks or stiches, or the odd sheaves only, shall be exempt from being tithed. But notwithstanding what is stated of the farmer's not being bound to make the wheat into shocks for the parson's convenience of tithing them, I believe that in fact, according to the usual course of husbandry, the setting up of the sheaves into shocks follows immediately after the binding into sheaves, so as that every shock in the same field shall consist of an equal number of sheaves, and then the (b) shocks are tithed, beginning at either end according to the election of the tithe-owner, who is entitled to have separated for him the tenth part also of the odd sheaves under ten.

Here it may not be improper to mention, that it hath been adjudged, that by the general custom of the realm for the *rakings* (c) of corn, no tithes shall be paid. But this supposes no fraud to have been used, and the rakings to have been involuntarily left in the ordinary course of husbandry. If they are of great value, and with an intention of defrauding the parson more is left, or scattered than might fairly and reasonably happen, they ought to be tithed.

(b) There are cases to shew, that if in the shocks, it is tithable that way, Per. Cur. Gwill. 1511. Mantatt v. Paine.

(c) Mo. 278. Grent v. Hunt, cited in Berd v. Adams, 1 Freem. 334. Gwill. 562. Anon. Gwill. 477. In Andrews v. Dane, 1 Cro. 660.

Gwill. 473. n. Nicholl's case, cited in Johnson v. Awbrey, 1 Cro. 475. Gwill. 180. Sherington v. Fleetwood, 2 Inst. 652. 1 R. A. 645. pl. 11. 12. accounts for it from the Levitical law. Degge, p. ii. c. 3. In some of these books what are tithable are called fresh rakings.

It

It has been stated by the (d) court of Exchequer as the general and irrefragable law of tithing, that each article is to be tithed after severance at that time, and at that stage of the process at which the parson can best see and judge, whether he has his fair tenth. We have before observed, that barley and oats are no longer *garbed*, or bound in sheaves except (e) by the custom of particular places. A case (f) arose relative to this subject, in which the defendant insisted among other matters, 1. That it had always been the customary method for the farmers in the neighbourhood, to begin and proceed to cut, and get in their corn from time to time as was convenient for them, and as the weather permitted, and to set out the tithes of what corn they so cut without waiting till the whole crop in the field was cut down; and that if in a wet and unsettled season, a whole field were to be cut down before any part of the corn was to be tithed and carried, all the corn except in very small fields must almost always be spoiled. 2. The defendant stated, that his tithes of barley and oats (called soft corn) were set out by the swarth except where measurement was found necessary from the effect of the wind, or the shape of the grounds, and that the remaining swarths under the number of ten were also measured, and the tenth part apportioned for the rector's tithe; that this was the customary method; that cocking or shocking soft corn was never practised by the farmers within the parish, or the county about it, and that the fairest and most unexceptionable way of tithing such corn, was by setting out every tenth swarth. At the hearing of the cause, which lasted several days, the rector's counsel, objected to the reading of any evidence taken relating to the custom of tithing in other parishes, and the court allowed the objection. And as to

(d) 3 Anstr. 954. Gwill. 1489.
Collyer v. Howes.

(e) Gwill. 967.

(f) Gwill. 961. Erskine v. Ruffle.

the first point, whether by the law of the land a whole field must be cut down before any part of it can be tithed, they were of opinion, that there was no such invariable rule : it holds good as to land in a common field belonging to different parishioners ; the parishioner cannot cut half a land and tithe it, he must cut the whole land before he begins to tithe ; but if the doctrine were to prevail in its utmost latitude, it would be inconvenient and prejudicial to the clergy, lay impropriators, and parishioners. Where the field is sown with the same, or with different sorts of corn or grain, and it is ripe at different times ; or in case of catching weather, these are exceptions to the general rule. The particular quantity of tithe to be set out is variable according to the circumstances : In general, a reasonable quantity ought to be set out, so as to be worth the tithe-owner's sending for, enough at least for a load, where the size of the field will admit of it, if it will not, and the corn is equally ripe, the tithe of the whole field ought to be set out. As to the second point, the court was of opinion, that barley and oats ought of common right to be tithed in cocks, and that tithing them by the swarth ought not to be admitted contrary to the method of tithing settled by law. They therefore directed the defendant to account for the tithes of these articles as having been improperly set out, founding their judgment on this point, as appears by the report, chiefly on prior authorities. But the reason of the thing also had its weight. For it was (g) said by the Chief Baron on a later occasion, that the court held in the case above cited, that the barley must be collected into heaps, not by any similarity to the mode of tithing other corn or hay, but from the nature of the thing, that the swath is not such a state of severance as enables the clergyman to see that he has his just tenth, and the article

(g) Gwill. 1490. in *Collyer v. Howes*.

must

must therefore be put into a proper state for that purpose before the tithe can be duly set out.

As to peas and beans, in a late (*b*) case, in which various matters were introduced, complaint was made that the tithe of peas was set out not in the cock as it was contended it ought to be, but merely from the hook as it was expressed, in little parcels almost in handfulls, and so intermixed, that it was impossible for the parson to husband it, or to carry it away. The court declared, there was no definite mode of tithing this article to be found in the books. They must, therefore, resort to principle, namely, that the tithe of it must be set out as soon as it comes into proper divisions or parcels, so as to let the tenth be seen, and judged of, and husbanded. But thinking they had not sufficient evidence before them to decide how far it was in this case so separated the other nine parts, as that it was practicable for the parson to take the just tenth, they directed an enquiry to ascertain the fact.

Having spoken of these principal articles of corn, and grain, before I proceed to other tithable matters, I shall here observe, that it is (*i*) not sufficient that the tithes have been set out unless the parson is duly permitted to enter and take them away, otherwise it is a fraudulent setting out, remediable by a suit upon the statute. The land occupier cannot therefore justify obstructing the tithe-owner from passing along the usual way for this purpose, though he might have come for the tithes another way. In a (*k*) suit for tithes about thirty years ago, the subject (among others) was discussed. Lands in the several occupations of two of the defendants had been before cultivated as one farm, and there was

(*b*) Gwill. 1504. Mantett v. Paine.

(*i*) 1 Bul. 108. Gwill. 1572. Anon.

(*k*) Gwill. 1109. in Bosworth v. Limbrick.

then a communication ~~over~~ part of the grounds with a public highway, which communication was obstructed by the present occupier of the spot over which it lay. This would have been the nearest and most convenient road for the rector, the plaintiff, to carry off his tithes; he accordingly prayed as against this defendant of the name of *Stock*, to have the way in question opened to carry off his tithes arising upon the lands of another defendant, and he adduced some evidence to prove, that this line of road was in fact a public highway. The court expressed their opinion, that this was not a case in which a court of equity could interfere, and clearly held, that if the road is a public one, the plaintiff's remedy is at law, either by indictment, or in respect of special damage by action on the case. That the parson must undoubtedly have a right of way to carry off his tithes from the place on which they arise, and the occupier must open a passage for him, or he subtracts his tithes. Ordinarily the parson is understood to have a right to use the same road which the occupier uses. If the occupier has a right, the parson has the same. It is accident whether this way is more or less convenient, nearer or farther; its being the nearest cannot alone give the parson a right to pass over another man's land. There having been a communication when all the lands were in one occupation, which the parson might then have been entitled to use, because the occupier used it, is no argument in support of a claim to use it when the occupation becomes several. The several occupiers may have no right to use it, therefore the parson can derive no such right from them. As against the defendant *Stock*, therefore, this bill was dismissed with costs.

The parson's accommodation is consulted in this respect also, that he is not bound by law to ~~superfluous~~ trouble in unloading his waggon of the tithes collected from the grounds

grounds of some of the parishioners before he drives it on those of others. For (l) where the tithes of wheat being set out, the plaintiff's servants came with a waggon and horses to fetch them away; but the defendant, such waggon being three parts loaded with tithe corn from the lands of other persons, obstructed the taking of the tithes so set out, unless the plaintiff's servants would first unload what they had so brought; on their refusal, the tithes were left and perished on the ground, the plaintiff having declined to fetch them away at any subsequent time; this defence was holden insufficient, and the party making it, was decreed to account for the value of the tithes, thus ineffectually set out, with costs.

II. *As to the tithes of hay and other the like articles, grass (m)* of common right is tithable when it is put into grass-cocks, and then, and not before, the tithes ought in general to be set out, because in that state of severance the tithe-owner may form a reasonable estimate, whether he has allotted to him his just tenth of the crop. The (n) parishioners are not by the general law bound to make the tithe-grass cock into hay, for (o) that which is due for tithes is but the tenth of the produce of their grounds, not of their subsequent labour and industry. But the (p) custom of each place is in some measure to be observed; and therefore, if the custom were, to measure out the tenth part of the grass standing for the tithe thereof, and that the parson should cut and make it, this has been deemed good: but now the validity of such custom seems over-ruled by (q) later and higher authority. On the other hand (r), if the parishioners have used to make

(l) Gwill. 775. *Lake v. Bruton*. v. Ellis.

(m) Watf. c. xlix. f. 441. *Degge* (p) Watf. *ibid*.

p. ii. c. 3. 1 R A. 644. (q) Gwill. 1561. *Knight v.*

(n) 2 Wms. 522, 3. *Fox v. Ayde*. Halley.

(o) Hob. 250. Gwill. 432. *Hide* (r) *Degge*, *ibid*.

the

the crop into hay-cocks before they have set forth their tithes they must do so still, but where there is no such custom, they may set them forth in grass-cocks.

In all (r) cases when the tithe of the grass is set forth, and the occupier is not bound to make it into hay, the tithe-owner may justify passing over the grounds of the former in his way to the place, in order to make the tithe-grass into hay, and may make it into hay there with as full authority as the occupier of the grounds himself, for this is a privilege necessarily incident to the right, and enjoyment of such tithes. Where therefore (s) such an occupier refused to let the rector's agents or servants make the grass cocks set forth for tithes into hay, on the ground, which produced the same (sheltering himself under the pretences of the inclemency of the season for hay-making, and the inconvenience and damage that must have accrued to him from such permission, both with respect to his own hay, and the ground on which it was to be made), the court declared, that the plaintiff was entitled to make his tithe grass into hay on the defendant's lands where it grew, and ordered the defendant to account for its value. By parity of reason it had (u) long before been determined, that a parson shall be allowed a reasonable time to take his tithes severed from the other nine parts, and to dry them (*verter*) before he carries them away; and (w) where the defendants in their answer to a bill by the proprietors of tithes, insisted that after the grass was put into cocks, it was the custom of the parish, that the parishioners were not to make up the grass round such cocks, the court declared it to be a void custom, not to rake up their grass into cocks, in order

(r) Watf. *ibid.* 2 R. A. 643. 12 E. IV. 6.

(s) Gwill. 776. *Crabb v. Hayne.*

(u) Bro. t. Dimes, pl. 12. cites

(w) Gwill. 566. *Staughton v.*

Hide.

to setting out the full tithes thereof, and that the defendant ought to account for the tithes of such hay.

But if a (x) farmer cuts his grass, and only put it into swaths not making it into hay, and carries it away, and gives it *green* to his beasts of the plough for their necessary sustenance, not having grass sufficient to maintain them otherwise, no tithes shall be paid in respect of it. In general, however, tithe is to be paid for fodder given to beasts used for the plough or pail. As where (y) the demand was for the tithes of rough hay grown in marshes, and fenny lands, it was suggested on behalf of the parishioners, that they paid tithe of hay and grain grown upon the meadow and arable lands, and because they had not sufficient grass within the parish to sustain their beasts in winter, they used to gather this hay, called fenny fodder for their sustenance, and for the better encrease of husbandry, and for this cause had been always freed from the payment of tithes of it. Such surmise was holden insufficient, for as to the allegation that they bestowed the fodder upon their cattle, it was not any cause of discharge, since by parity of reason they might prescribe for corn spent in their families, or consumed as provender, which would be unwarrantable defalcations from the rector's rights.

On the other hand, where (z) the surmise was, and it was found by a jury, that the impropiator from time immemorial had been seised in fee of a certain meadow, and held the same, and took the profits of it in lieu of all tithes

(x) 1 R. A. 645. *Crawley v. Watts*, Watf. c. xlix. f. 439. Degge, p. ii. c. 3. ter is referred to the head of *modus decimandi*. "A particular piece of

(y) Degge. *ibid.* 2 Cro. 47. *Webb v. Warner*, Mo. 683. S. C. "wood land, or meadow land separately, and immediately enjoyed by the parson, may be a com-

(z) 2 Cro. 501. *Gwill*. 1575. "penfation for the tithe of wood, and hay." *Gwill*. 1561. *Knights v. Halfey*. S. C. In which last book this mat-

of hay within the hamlet, though it were objected, that it should be intended as parcel of the glebe, and that it ought to be expressly shewn to have been given in recompence of those tithes; yet the court over-ruled the objection, and adjudged that the meadow must be reputed to have been given in recompence of the tithes, and that thus, in regard of that land, the discharge of those tithes commenced.

Clover-grass (*a*) for all purposes of tithing seems not distinguishable from the ordinary species. Such also appear to have been the decisions in respect to (*b*) cinquefoil. And this principle seems to be extended to the seed of clover, for it has been (*c*) determined, that clover seed is not to pay tithe at the mill, but that the tenth part of the stock is to be set out in the field, after it is severed from the ground: But if instead of being as in one of those cases converted into horse bread for feeding hogs, or of being carried to the mill, it is sold and made profit of by the owner *as seed*, being in that state, as we have before seen, a species of small tithes; it seems doubtful whether in such case the tithe ought to be set out in the field in analogy to the nature of hay. Generally, however, the tithes of lands sown with clover, must be set out in conformity to the rule with regard to all hay. And in a (*d*) cause in which the court of exchequer had originally decided in favour of setting out the tithes of clover in the swath, from an idea that it was commonly carried from that state without getting into the shape of cocks at all, they afterwards on the evidence before them, thought they had misconceived that fact, and that clover in almost every case is put into cocks,

(*a*) Bunb. 344. Gwill. 530. Pomfret v. Lander. Accordingly a custom to set out the tithes of both in swaths was disallowed. Gwill. 584. Witherington v. Harris.

(*b*) Gwill. 535. Anon.

(*c*) Gwill. 1615. Lloyd v. Bentley.

(*d*) 3 Anfr. 954. Gwill. 1489. Collyer v. Howes.

sometimes only before carting, most frequently in a much earlier stage ; that it was utterly impossible to ascertain with any precision the fairness of the tithe, if set out in the swath ; they, therefore, upon a rehearing, corrected their former opinion, and held that the fair and legal way of tithing clover like other hay, was when it has been put into the shape of cocks.

As in the case of ordinary grass (*e*), so clover, and other artificial grass and tares, or vetches cut green, and given to cattle used in husbandry pay no tithe, though according to (*f*) some opinions this exemption requires the aid of a special custom to support it. It seems, however, available without reference to any custom ; but then it (*g*) is subject to this proviso, that there is not a sufficiency of other sustenance for the cattle, the court in a recent instance, having thought it requisite to direct an enquiry to ascertain that fact.

Dr. Burn (*b*) describes the manner of sowing, cutting down, threshing, and dressing rape-seed, (which is done before it is removed out of the field), and adds, it is usual for the occupier of the land, to agree with the tithe-owner for the tithe of it at so much an acre ; it never having been determined in what way such tithe should be set out ; but that the better opinion seems to be, that it should be set out by measure in the field after it is threshed and dressed, as most consistent with the necessary mode of its cultivation.

The same author reduces under this class the articles of fern, heath, furze, and broom. The first of these is ranked by Sir Edward Coke (*i*), among things freed from

(*e*) Bunb. 279. Gwill. 679. Hayes v. Dowse.

(*g*) Gwill. 1504. Mantell v. Paine.

(*b*) 3 Eccl. 1. 417-8.

(*f*) Degge, p. ii. c. 3. 2 Cro. 393. Meade v. Thurmiam.

(*i*) 2 Inst. 652.

tithes by the common law, and custom of the realm. But for heath, furze, and broom (*k*), it seems tithes shall be paid, unless the party sets forth, and proves an immemorial custom, or prescription, that tithes have been paid of milk calves, or the like, in respect of cattle kept on the same lands, which is a valid cause of exemption. Another (*l*) common ground of exemption is, where these articles are spent in the parishioner's dwelling-house; but if sold, they are tithable. Lastly, furzes (*m*) used by the husbandman to make pens for his sheep pay no tithe, but (*n*) they are tithable, if employed for husbandry purposes in a different parish.

By particular statutes a pecuniary compensation is given to tithe-owners in lieu of the tithes of hemp (*o*), flax, and madder (*p*), namely, five shillings an acre, and so proportionably for more or less ground sown with any of those articles, to be paid before they are removed from off the land; for the recovery of which money the parson entitled, shall have the usual remedy allowed by law; but this is not to extend to charge any lands discharged from tithes by any *modus decimandi*, antient composition, or otherwise.

III. The nature of *agistment-tithe* has been before in some measure explained. It is sufficiently apparent, that (*q*) this,

(*k*) God. rep. cam. 413. Wood. Inf. 166. 168. Gwill. 1028. Wolferstan v. Bragington.

(*l*) 1 Cro. 609. Austyn v. Lucas, 8 Vin. Abr. 591. Gwill. 610. Roffe v. Harding, Gibf. 680. Danv. Abr. t. Mimes, f. 597. For the house is for the maintenance of husbandry, 1 Vent. 75.

(*m*) Wood, Inf. 168.

(*n*) Gwill. 1022. Ellis v. Ferner.

(*o*) St. 11 & 12. w. 3. 16. made perpetual by st. 1. G. 1. st. 2. c. 26. § 2.

(*p*) St. 31. G. 2. c. 12. Continued by St. 5. G. 3. c. 18. for 14 years, and to the end of the then next Session

(*q*) Gwill. 1335. in Ellis v. Saul. from 1 Anstr. 332.

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though a predial tithe, is from the essence of it no object of the general provisions of the statute of Edward the sixth for the setting out of tithes, and can afford no ground of action upon that statute.

Tithe (*r*) of agistment is due of common right, because the grafs, which is eaten, is *de jure* tithable, and must have paid tithe if left to grow, and eat when arrived at maturity.

We have before seen, that this right accrues in respect of the grafs eaten, and not of the improvement of the cattle, whether belonging to the occupier of the land, or agisted for hire. In all cases, therefore, the demand (*r*) is to be made against such occupier and not against the owner of the beasts, whether depasturing on grafs grounds (*r*), or under agreement for the eatage of a field of turnips, or the like. This is a great relief, and accommodation to the parson, to whom it would (*u*) be burthenfome to sue the several owners of the cattle: some of whom probably it would be difficult to ascertain, which might lead to endless litigation. All such trouble is avoided by a compendious demand against the ostensible occupier, who is accordingly liable, whether (*w*) he occupies his own freehold lands, or is in possession as a lessee. This, however, supposes the spot to be a private ground, or inclosure. For (*x*) on the other hand, if the place where the cattle are depastured is an open common, or commonable land, the demand must of necessity be made against the respective owners of the beasts, because there is no profit or emolument forthcoming to the lord, or owner of the soil.

(*r*) 2 Sal. 655. in *Hicks v. Wood-* Smith seems *contra*.
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wood v. Gibbon, 9 Vin. Abr. 38.
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(*u*) 1 R.A. 656. *Facey v. Lange*.

(*w*) Degge, p. ii. c. 5.

(*x*) Bunb. 3. n.

At the beginning of this chapter I took occasion to mention, that land which has borne its annual burthen by paying tithes of hay and corn, is for the year discharged of tithe of agistment. If (y), however, an occupier after the corn is cleared, sows the land with turnips, and then agists the sheep of a stranger, or fattens his own sheep and sells them, he shall pay tithe for the agistment, notwithstanding this course of husbandry meliorates the land for corn, where the soil is dry and sandy, by which means the parson obtains in the ensuing year *uberiores decimas*, for (z) if the turnips had been sold, and profit in that way made of them, they would have paid tithes.

As to the beasts agisted, they must in general be barren cattle, and yield no profit to the parson to intitle him to this species of tithes; though in the case last cited, it was thought no bar to the demand, that tithe of lamb and wool of the sheep so agisted on *turnips* had been before received. If a pasture is eaten with mixt cattle, partly profitable to the tithe-owner as milch cows, ewes, and lambs, and cattle used or bred for the plough, or pail; and partly barren and unprofitable, the (a) authentic and invariable rule seems to be, that tithe in kind shall be paid for the profitable, and agistment-tithe for such as are unprofitable: though Degge (b) suggests a doubt whether if the profitable exceed the others in number, they shall not exempt the rest; a surmise the more extraordinary from a writer in general so well disposed to the rights of the church.

It appears then, that what are deemed profitable cattle, and for the depasturing of which no agistment-tithe is demandable, are either such as render tithes more immediately,

(y) Gwill. 537. Daniel v. Tuffnall. Bunb. 314. Gwill. 714. Swin-son v. Digby. Gwill. 606. Hall v. Filter.

(z) Gwill. 540. Bordley v. Tims,

(a) Gibf. 677.

(b) P. ii. c. 5.

(that is to say), of their young milk, and wool; or such as being employed in works of husbandry, consequentially augment, and indeed are an efficient cause in producing those principal titbable articles, corn, and grain. On (c),^a bill, therefore, for tithes for the agistment of barren and unprofitable cattle, generally, without expressly demanding them for sheep, the court refused to direct an account for the latter, it being the constant practice in suits for agistment tithes to demand it for sheep expressly, for they yielding lambs, or wool are not reputed barren, and unprofitable, and no agistment tithe consequently can be due for them, unless sold out of the parish before shearing time. Conformably to this decision, in a suit (d), in which the claim was explicitly made, it was decreed, that an account should be taken of what was due to the plaintiff for the tithe of agistment of all sheep kept, fed, and depastured on the lands occupied by the defendants, and by them sold, or otherwise disposed of from the time of their last shearing, until they were sold off fat, and taken out of the parish for sale, and before the next shearing of them; although it was insisted, that all the sheep from time to time sold, or removed were as often replaced by others purchased by the defendants, and depastured in their stead till the next shearing day, when they paid a full tithe in kind to the impropiators, or their lessees, who were entitled to tithes of wool, and lamb, the tithe claimed for agistment in question in that cause being due to the plaintiff the vicar. A similar (e) decree was made in favour of the demand in a case, in which the sheep had been brought into the parish before shearing time in one year, but sold before shearing time in the next: the claim was

(c) 3 Anstr. 829. Gwill. 1456. Aestroppe, Gwill. 6067. Smith v. Turner v. Williams, 1 R. A. 642. Johnson.

Dub.

(e) 2 Anstr. 500. Gwill. 1424.

(d) Gwill. 1048. Bateman v. Howes v. Carter.

refisted on the ground, that the farmers in that neighbourhood found it necessary to fold sheep on their ground to manure it, considering the encrease in the crop by this practice as the principal gain from the sheep, that they were like beasts of the plough, which pay no other tithe, except in the increase of the crop produced by their labour, and that the rector has his share in this profit; It was farther insisted, that the other profit arising from the sheep, the wool, had paid tithe, and that as they had not been in the parish a year, and had paid tithe of a year's wool, that was a discharge for the whole year. But the court, notwithstanding these arguments, thought the former adjudication decisively governed the present case, and decreed accordingly; and one of the judges considered (*f*) the wool-tithe as paid for the preceding year, and that as the defendant had kept the sheep for half of another year, and paid no tithe, agistment-tithe must be paid for that time. So that upon the whole it appears, that the tithe of agistment is calculable from the last time of shearing the sheep. It (*g*) seems also due for the agistment of yearling lambs.

But (*b*) tithe of wool may be due in one parish, and tithe of agistment in another. As if a man occupies a farm, and lives in the parish of A. and holds other lands quite distinct from the farm, and no way exempted in the parish of B., and depastures his sheep upon the lands in that parish, but shears them in A., the parson of B. shall have an agistment-tithe, because he has no other profit from those sheep. And (*i*) where the plaintiff as rector of Lilly demanded agistment-tithe of sheep which were shorn,

(*f*) Gwill. 723. n. Dummer v. Wingfield, acc. as to both these points. (*b*) Gwill. 1025-6. in Ellis v. Fermor.

(*i*) Gwill. 1030. n. Hatfield v. Bunh. 90. Gwill. 629. Baker v. Sweet. Rowling.

and

and had dropt their lambs in the adjoining parish of Offley, the common fields where the sheep fed lying in both parishes, it was objected, that it would be double tithing if the defendant having paid the tithe of wool and lamb to the vicar of Offley, were to pay agistment-tithe to the rector of Lilly; yet the court declared, that this was an inconvenience which the defendant had brought upon himself by not shearing a proportionable number of his ewes, and letting them yearn their lambs in Lilly. But if (*k*) the occupier of a farm in the parish of A. prescribe for common of pasture for a certain number of sheep on land in the parish of B., on which such sheep are occasionally agisted, and that tithe-wool or other satisfaction has been immemorially paid to the rector of A. as often as the sheep were shorn in that parish, and that it hath been the constant usage to shear them there; this is a good defence against the vicar of B. claiming agistment-tithe for the time the sheep were depastured in his parish, though he derives no profit as tithes from them, chiefly it seems, because the right of common (which is an incorporeal hereditament) is legally reputed as *part* of the farm, to which it is appendant or appurtenant. Otherwise it is of right of common (*l*) in *gross*, which is annexed to the person and not to land, the party intitled to which must pay agistment-tithe where the commonable land is situate.

It is to be observed, in regard to the topic we are now considering, that the statute which I have had, and shall continue to have very frequent occasion to mention, namely, 2 and 3 Ed. VI. c. 13. § 3 provides, that persons having tithable cattle depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the *encrease* of such cattle to the person

(*k*) Gwill. 1022. *Ellis v. Fermor*, (*l*) Gwill. 1027.

intituled to the tithes of that parish, or place in which the owner of the cattle dwells. The statute is silent concerning agistment-tithe (by name at least) for cattle so fed. And sir Edward Coke (*m*) in his comment upon this act of Parliament, uses the same limits of expression, observing, that where the king ought to have the tithes within the wastes or commons in his forests which are not within any parish, this branch gives the tithes of the *encrease* of cattle to the parson of the parish where the owner dwells. However, in a case (*n*) as early as the time of queen Elizabeth, it was ordered by the court of exchequer in reference to this law, that the tithes *generally* of a fen called Wildmore, which was not known to lie in any certain parish should be paid to the parson, or other proprietor of the tithes in the parish in which the owner of the cattle inhabited: And it is added, that if the tithes have been immemorially paid to the parson of any particular parish, although it be unknown in what parish the moor or common is, there they shall continue to be paid according to the usage. For, by the statute, tithes ought to be paid as they have accustomedly been paid. And (*o*) in the case of commons appurtenant above referred to, this law is referred to by two of the judges as if they considered agistment-tithe to be clearly within its operation; one of whom says, that the provision for payment of tithes to the parson of the parish in which the owner of the cattle lives, implies, that in ordinary cases, not in the special case before the court, where *it is known* in what parish such a common lies, tithes are due to the rector, or vicar of that parish, for the cattle *feeding therein*; and he adds, that the determination of the House of Lords, which I am now about to mention, proceeded upon that supposition, meaning, I apprehend, in the sense

(*m*) 2 Inst. 651.

(*o*) Gwill. 1024, 5, 6.

(*n*) Sav. 60. Anon.

of the maxim *exceptio probat regulam* ; since that determination forms another exception to the general principle of tithing where the agisted land is situate ; which general principle was understood and presupposed in arguing the validity of the particular custom made the foundation of deviating from such principle in that particular instance. The case (p) was this ; there being a large uninclosed common, lying between and extending itself into the several parishes of A. B. and C. and other towns, the inhabitants of which had for a time immemorial in order to avoid multiplicity of suits, permitted a sort of promiscuous intercommoning on such open pasture ; the right was deemed to belong to the respective farms in each town, and taken to be part of those farms, and the owner of the cattle so fed always paid the tithes of them to the parson of that parish in which their farms were situated. The appellant rented one farm in A. and another of B., and paid tithes according to the aforesaid usage to the respective incumbents of those parishes, for his cattle fed upon the common. He also occupied five acres of meadow ground in the parish of C. for which he set up a modus or customary payment of two-pence an acre, and after that rate payment had been made or tendered to the respondent, the rector of the last-mentioned parish ; yet as such rector he had sued in the exchequer for tithe herbage of this meadow ground, and also for the tithe of the feed of the respondent's cattle on the open common. The court of exchequer decreed, that the defendant there should account for the modus or customary payment, and should also account for the tithes of his cattle fed upon that part of the common which lay in the parish of C., there being proof that the cattle were driven upon that part. But on the appeal, the house of Lords

(p) Bro. P. B. 278. Gwill. 604. Mickleburgh v. Crisp, 9 Vin. Abr. 43. S. C. Abr.

reversed the decree, because the custom that every farmer should pay tithes to the rector of the parish in which he lived was good, and the house ordered and adjudged, that the plaintiff's bill in the court of exchequer should be dismissed without prejudice to his right, according to the modus for the five acres of meadow ground in C. the respondent's parish. This authority was relied on as in point by one at least of the judges, who decided the before-mentioned case of common appurtenant. These several decisions appear to be professedly built upon distinct grounds, the one proceeding on the validity of the custom; the other on the legal argument, that the right of common was part of the farm, to which it was appurtenant; but in effect, both these considerations will be found to contribute their joint support to each determination.

To revert to beasts of the plough, or such as are employed for the purposes of husbandry, these (q) by the general rule of law as hath been already intimated, are exempted from the payment of agistment-tithe. An obvious and equitable restriction of the rule arises where the cattle are depastured in one parish, and used in husbandry in another. In such case (r) they are subject to this tithe in the parish, in which they are depastured. The reason is evident, provided they work in the same parish in which they are depastured, the *uberiores decime*, which are the effect of their labour falling to the lot of the same parson, who would otherwise claim the tithe of their pasture, are a satisfaction for the latter. If the cattle fed in one parish, labour in another, the parson of such other parish has the benefit, and he, where they are depastured must have an agistment-tithe or none. The court in one instance (s) apportioned this tithe of agistment in con-

(q) Degge, p. ii. c. 5.

(s) 1 Ld. Raym. 129. Gwill. 1029.

(r) Gwill. 1110. in Boswath v. a. Scoles v. Lowther, Limbrick, Degge, p. ii. c. 5.

formity to the above reasoning. The parson of *Swillington* sued in the ecclesiastical court for tithes of the cattle depastured in his parish. The defendant lived in *Kippax* the next adjoining parish, and occupied a large tract of arable land there, and had besides forty acres of meadow and pasture, and four acres only of arable land in *Swillington*. The court of common pleas being applied to for a prohibition to restrain the proceeding before the spiritual judge, declared, that if there had not been arable land in *Swillington*, it was without doubt that the parson ought to have had tithes. For the reason of exempting beasts of the plough is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land ; but here that reason would fail. In the same manner where a man has wood in one parish, and arable land in another ; if he uses the wood in making fences for his arable land, he shall pay tithes to the parson of the parish where the wood grows : but it would be otherwise, if the wood were in the same parish. The same law prevails, where the wood grows in one parish, and is spent for fuel in the owner's house in another. They then apply these illustrations to the question before them, whether the ploughing of the four acres in *Swillington* would excuse the cattle generally from agistment tithe ; and they held clearly, that it would only excuse those cattle, which ploughed the four acres, and not those which ploughed in *Kippax*. For the parson ought to have something in lieu of the tithe-herbage claimed, which compensation can only be derived from and out of the four arable acres in *Swillington*. Therefore a prohibition was granted *quoad* the cattle only, which ploughed the arable acres in *Swillington*, and as to the rest, the parson had liberty to proceed in the court below.

The

tithes by the common law, and custom of the realm. But for heath, furze, and broom (*k*), it seems tithes shall be paid, unless the party sets forth, and proves an immemorial custom, or prescription, that tithes have been paid of milk calves, or the like, in respect of cattle kept on the same lands, which is a valid cause of exemption. Another (*l*) common ground of exemption is, where these articles are spent in the parishioner's dwelling-house; but if sold, they are tithable. Lastly, furzes (*m*) used by the husbandman to make pens for his sheep pay no tithe, but (*n*) they are tithable, if employed for husbandry purposes in a different parish.

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(e) 2 Anstr. 500. Gwill. 1424.

(d) Gwill. 1048. Bateman v. Howes v. Carter.

refisted on the ground, that the farmers in that neighbourhood found it necessary to fold sheep on their ground to manure it, considering the encrease in the crop by this practice as the principal gain from the sheep, that they were like beasts of the plough, which pay no other tithe, except in the increase of the crop produced by their labour, and that the rector has his share in this profit; It was farther insisted, that the other profit arising from the sheep, the wool, had paid tithe, and that as they had not been in the parish a year, and had paid tithe of a year's wool, that was a discharge for the whole year. But the court, notwithstanding these arguments, thought the former adjudication decisively governed the present case, and decreed accordingly; and one of the judges considered (f) the wool-tithe as paid for the preceding year, and that as the defendant had kept the sheep for half of another year, and paid no tithe, agistment-tithe must be paid for that time, So that upon the whole it appears, that the tithe of agistment is calculable from the last time of shearing the sheep. It (g) seems also due for the agistment of yearling lambs.

But (b) tithe of wool may be due in one parish, and tithe of agistment in another. As if a man occupies a farm, and lives in the parish of A. and holds other lands quite distinct from the farm, and no way exempted in the parish of B., and depastures his sheep upon the lands in that parish, but shears them in A., the parson of B. shall have an agistment-tithe, because he has no other profit from those sheep. And (i) where the plaintiff as rector of Lilly demanded agistment-tithe of sheep which were shorn,

(f) Gwill. 713. n. Dummer v. Wingfield, acc. as to both these points.

(b) Gwill. 1025-6. in Ellis v. Fermor.

(i) Gwill. 1030. n. Hatfield v.

(g) Bunb. 90. Gwill. 629. Baker v. Sweet.

Rowling.

and

and had dropt their lambs in the adjoining parish of Offley, the common fields where the sheep fed lying in both parishes, it was objected, that it would be double tithing if the defendant having paid the tithe of wool and lamb to the vicar of Offley, were to pay agistment-tithe to the rector of Lilly; yet the court declared, that this was an inconvenience which the defendant had brought upon himself by not shearing a proportionable number of his ewes, and letting them yearn their lambs in Lilly. But if (k) the occupier of a farm in the parish of A. prescribe for common of pasture for a certain number of sheep on land in the parish of B., on which such sheep are occasionally agisted, and that tithe-wool or other satisfaction has been immemorially paid to the rector of A. as often as the sheep were shorn in that parish, and that it hath been the constant usage to shear them there; this is a good defence against the vicar of B. claiming agistment-tithe for the time the sheep were depastured in his parish, though he derives no profit as tithes from them, chiefly it seems, because the right of common (which is an incorporeal hereditament) is legally reputed as *part* of the farm, to which it is appendant or appurtenant. Otherwise it is of right of common (l) in *gross*, which is annexed to the person and not to land, the party intitled to which must pay agistment-tithe where the commovable land is situate.

It is to be observed, in regard to the topic we are now considering, that the statute which I have had, and shall continue to have very frequent occasion to mention, namely, 2 and 3 Ed. VI. c. 13. § 3 provides, that persons having tithable cattle depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the *increase* of such cattle to the person

(k) Gwill. 1022. *Ellis v. Fermor*, (l) Gwill. 1027.

intituled to the tithes of that parish, or place in which the owner of the cattle dwells. The statute is silent concerning agistment-tithe (by name at least) for cattle so fed. And sir Edward Coke (*m*) in his comment upon this act of Parliament, uses the same limits of expression, observing, that where the king ought to have the tithes within the wastes or commons in his forests which are not within any parish, this branch gives the tithes of the *encrease* of cattle to the parson of the parish where the owner dwells. However, in a case (*n*) as early as the time of queen Elizabeth, it was ordered by the court of exchequer in reference to this law, that the tithes *generally* of a fen called Wildmore, which was not known to lie in any certain parish should be paid to the parson, or other proprietor of the tithes in the parish in which the owner of the cattle inhabited: And it is added, that if the tithes have been immemorially paid to the parson of any particular parish, although it be unknown in what parish the moor or common is, there they shall continue to be paid according to the usage. For, by the statute, tithes ought to be paid as they have accustomably been paid. And (*o*) in the case of commons appurtenant above referred to, this law is referred to by two of the judges as if they considered agistment-tithe to be clearly within its operation; one of whom says, that the provision for payment of tithes to the parson of the parish in which the owner of the cattle lives, implies, that in ordinary cases, not in the special case before the court, where *it is known* in what parish such a common lies, tithes are due to the rector, or vicar of that parish, for the cattle *feeding therein*; and he adds, that the determination of the House of Lords, which I am now about to mention, proceeded upon that supposition, meaning, I apprehend, in the sense

(*m*) 2 Inst. 651.

(*o*) Gwill. 1024, 5, 6.

(*n*) Sav. 60. Anon.

of the maxim *exceptio probat regulam* ; since that determination forms another exception to the general principle of tithing where the agisted land is situate ; which general principle was understood and presupposed in arguing the validity of the particular custom made the foundation of deviating from such principle in that particular instance. The case (p) was this ; there being a large uninclosed common, lying between and extending itself into the several parishes of A. B. and C. and other towns, the inhabitants of which had for a time immemorial in order to avoid multiplicity of suits, permitted a sort of promiscuous intercommoning on such open pasture ; the right was deemed to belong to the respective farms in each town, and taken to be part of those farms, and the owner of the cattle so fed always paid the tithes of them to the parson of that parish in which their farms were situated. The appellant rented one farm in A. and another of B., and paid tithes according to the aforesaid usage to the respective incumbents of those parishes, for his cattle fed upon the common. He also occupied five acres of meadow ground in the parish of C. for which he set up a modus or customary payment of two-pence an acre, and after that rate payment had been made or tendered to the respondent, the rector of the last-mentioned parish ; yet as such rector he had sued in the exchequer for tithe herbage of this meadow ground, and also for the tithe of the feed of the respondent's cattle on the open common. The court of exchequer decreed, that the defendant there should account for the modus or customary payment, and should also account for the tithes of his cattle fed upon that part of the common which lay in the parish of C., there being proof that the cattle were driven upon that part. But on the appeal, the house of Lords

(p) Bro. P. B. 278. Gwill. 604. *Mickleburgh v. Crisp*, 9 Vin. Abr. 43. S. C. Abr.

reversed the decree, because the custom that every farmer should pay tithes to the rector of the parish in which he lived was good, and the house ordered and adjudged, that the plaintiff's bill in the court of exchequer should be dismissed without prejudice to his right, according to the modus for the five acres of meadow ground in C. the respondent's parish. This authority was relied on as in point by one at least of the judges, who decided the before-mentioned case of common appurtenant. These several decisions appear to be professedly built upon distinct grounds, the one proceeding on the validity of the custom; the other on the legal argument, that the right of common was part of the farm, to which it was appurtenant; but in effect, both these considerations will be found to contribute their joint support to each determination.

To revert to beasts of the plough, or such as are employed for the purposes of husbandry, these (q) by the general rule of law as hath been already intimated, are exempted from the payment of agistment-tithe. An obvious and equitable restriction of the rule arises where the cattle are depastured in one parish, and used in husbandry in another. In such case (r) they are subject to this tithe in the parish, in which they are depastured. The reason is evident, provided they work in the same parish in which they are depastured, the *uberiores decime*, which are the effect of their labour falling to the lot of the same parson, who would otherwise claim the tithe of their pasture, are a satisfaction for the latter. If the cattle fed in one parish, labour in another, the parson of such other parish has the benefit, and he, where they are depastured must have an agistment-tithe or none. The court in one instance (s) apportioned this tithe of agistment in con-

(q) Degge, p. ii. c. 5.

(r) 1 Ld. Raym. 129. Gwill. 1029.

(s) Gwill. 1110. in Boswath v. n. Scoles v. Lowther.

Limbrick, Degge, p. ii. c. 5.

formity to the above reasoning. The parson of *Swillington* sued in the ecclesiastical court for tithes of the cattle depastured in his parish. The defendant lived in *Kippax* the next adjoining parish, and occupied a large tract of arable land there, and had besides forty acres of meadow and pasture, and four acres only of arable land in *Swillington*. The court of common pleas being applied to for a prohibition to restrain the proceeding before the spiritual judge, declared, that if there had not been arable land in *Swillington*, it was without doubt that the parson ought to have had tithes. For the reason of exempting beasts of the plough is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land; but here that reason would fail. In the same manner where a man has wood in one parish, and arable land in another; if he uses the wood in making fences for his arable land, he shall pay tithes to the parson of the parish where the wood grows: but it would be otherwise, if the wood were in the same parish. The same law prevails, where the wood grows in one parish, and is spent for fuel in the owner's house in another. They then apply these illustrations to the question before them, whether the ploughing of the four acres in *Swillington* would excuse the cattle generally from agistment tithe; and they held clearly, that it would only excuse those cattle, which ploughed the four acres, and not those which ploughed in *Kippax*. For the parson ought to have something in lieu of the tithe-herbage claimed, which compensation can only be derived from and out of the four arable acres in *Swillington*. Therefore a prohibition was granted *quoad* the cattle only, which ploughed the arable acres in *Swillington*, and as to the rest, the parson had liberty to proceed in the court below.

tithes by the common law, and custom of the realm. But for heath, furze, and broom (*k*), it seems tithes shall be paid, unless the party sets forth, and proves an immemorial custom, or prescription, that tithes have been paid of milk calves, or the like, in respect of cattle kept on the same lands, which is a valid cause of exemption. Another (*l*) common ground of exemption is, where these articles are spent in the parishioner's dwelling-house; but if sold, they are tithable. Lastly, furzes (*m*) used by the husbandman to make pens for his sheep pay no tithe, but (*n*) they are tithable, if employed for husbandry purposes in a different parish.

By particular statutes a pecuniary compensation is given to tithe-owners in lieu of the tithes of hemp (*o*), flax, and madder (*p*), namely, five shillings an acre, and so proportionably for more or less ground sown with any of those articles, to be paid before they are removed from off the land; for the recovery of which money the parson entitled, shall have the usual remedy allowed by law; but this is not to extend to charge any lands discharged from tithes by any *modus decimandi*, antient composition, or otherwise.

III. The nature of *agistment-tithe* has been before in some measure explained. It is sufficiently apparent, that (*q*) this,

(*k*) God. rep. can. 413. Wood. Inst. 166. 168. Gwill. 1028. Wolferstan v. Bringtonton.

(*l*) 1 Cro. 609. Austyn v. Lucas, 8 Vin. Abr. 591. Gwill. 610. Roffe v. Harding, Gibb. 680. Danv. Abr. t. 14 fines, f. 597. For the house is for the maintenance of husbandry, 1 Vent. 75.

(*m*) Wood, Inst. 168.

(*n*) Gwill. 1022. Ellis v. Farmer.

(*o*) St. 11 & 12. w. 3. 16. made perpetual by st. 1. G. 1. st. 2. c. 26. § 2.

(*p*) St. 31. G. 2. c. 12. Contin. by St. 5. G. 3. c. 18. for 14 years, and to the end of the then next Session

(*q*) Gwill. 1335. in Ellis v. Saul. from 1 Anstr. 332.

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though a predial tithe, is from the effence of it no object of the general provisions of the statute of Edward the sixth for the setting out of tithes, and can afford no ground of action upon that statute.

Tithe (*r*) of agistment is due of common right, because the grafs, which is eaten, is *de jure* titbable, and must have paid tithe if left to grow, and cut when arrived at maturity.

We have before seen, that this right accrues in respect of the grafs eaten, and not of the improvement of the cattle, whether belonging to the occupier of the land, or agisted for hire. In all cases, therefore, the demand (*s*) is to be made against such occupier and not against the owner of the beasts, whether depasturing on grafs grounds(*t*), or under agreement for the eatage of a field of turnips, or the like. This is a great relief, and accommodation to the parson, to whom it would (*u*) be burthensome to sue the several owners of the cattle: some of whom probably it would be difficult to ascertain, which might lead to endless litigation. All such trouble is avoided by a compendious demand against the ostensible occupier, who is accordingly liable, whether (*w*) he occupies his own freehold lands, or is in possession as a lessee. This, however, supposes the spot to be a private ground, or inclosure. For (*x*) on the other hand, if the place where the cattle are depastured is an open common, or commonable land, the demand must of necessity be made against the respective owners of the beasts, because there is no profit or emolument forthcoming to the lord, or owner of the soil.

(*r*) 2 Sal. 655. in *Hicks v. Wood-* Smith seems *contra*.
son.

(*s*) Bunb. 3. Gwill. 1582. Under-
wood v. Gibbon, 9 Vin. Abr. 38.
Gwill. 626-7. *Fisher v. Ledman*,
notwithstanding, Gwill. 577. Coe v.

(*t*) Gwill. 659. *Kershaw v. Isles*.

(*u*) 1 R.A. 656. *Facey v. Lange*.

(*w*) Degge, p. ii. c. 5.

(*x*) Bunb. 3. n.

At the beginning of this chapter I took occasion to mention, that land which has borne its annual burthen by paying tithes of hay and corn, is for the year discharged of tithe of agistment. If (y), however, an occupier after the corn is cleared, sows the land with turnips, and then agifts the sheep of a stranger, or fattens his own sheep and sells them, he shall pay tithe for the agistment, notwithstanding this course of husbandry meliorates the land for corn, where the soil is dry and sandy, by which means the parson obtains in the ensuing year *uberiores decimas*, for (z) if the turnips had been sold, and profit in that way made of them, they would have paid tithes.

As to the beasts agifted, they must in general be barren cattle, and yield no profit to the parson to intitle him to this species of tithes; though in the case last cited, it was thought no bar to the demand, that tithe of lamb and wool of the sheep so agifted on *turnips* had been before received. If a pasture is eaten with mixt cattle, partly profitable to the tithe-owner as milch cows, ewes, and lambs, and cattle used or bred for the plough, or pail; and partly barren and unprofitable, the (a) authentic and invariable rule seems to be, that tithe in kind shall be paid for the profitable, and agistment-tithe for such as are unprofitable: though Degge (b) suggests a doubt whether if the profitable exceed the others innumber, they shall not exempt the rest; a surmise the more extraordinary from a writer in general so well disposed to the rights of the church.

It appears then, that what are deemed profitable cattle, and for the depasturing of which no agistment-tithe is demandable, are either such as render tithes more immediately,

(y) Gwill. 537. Daniel v. Tuffnall. Bunb. 314. Gwill. 714. Swin-
son v. Digby. Gwill. Co6. Hall v.
Filter.

(z) Gwill. 540. Bordley v. Tims,

(a) Gibl. 677.

(b) P. ii. c. 5.

(that is to say), of their young milk, and wool; or such as being employed in works of husbandry, consequentially augment, and indeed are an efficient cause in producing those principal titbable articles, corn, and grain. On (c), a bill, therefore, for tithes for the agistment of barren and unprofitable cattle, generally, without expressly demanding them for sheep, the court refused to direct an account for the latter, it being the constant practice in suits for agistment tithes to demand it for sheep expressly, for they yielding lambs, or wool are not reputed barren, and unprofitable, and no agistment tithe consequently can be due for them, unless sold out of the parish before shearing time. Conformably to this decision, in a suit (d), in which the claim was explicitly made, it was decreed, that an account should be taken of what was due to the plaintiff for the tithe of agistment of all sheep kept, fed, and depastured on the lands occupied by the defendants, and by them fold, or otherwise disposed of from the time of their last shearing, until they were sold off fat, and taken out of the parish for sale, and before the next shearing of them; although it was insisted, that all the sheep from time to time fold, or removed were as often replaced by others purchased by the defendants, and depastured in their stead till the next shearing day, when they paid a full tithe in kind to the impropiators, or their lessees, who were entitled to tithes of wool, and lamb, the tithe claimed for agistment in question in that cause being due to the plaintiff the vicar. A similar (e) decree was made in favour of the demand in a case, in which the sheep had been brought into the parish before shearing time in one year, but fold before shearing time in the next: the claim was

(c) 3 Anstr. 829. Gwill. 1456. Aestroppe, Gwill. 6067. Smith v. Turner v. Williams, 1 R. A. 642. Johnson.

Dub.

(e) 2 Anstr. 500. Gwill. 1424.

(d) Gwill. 1048. Bateman v. Howes v. Carter.

refisted on the ground, that the farmers in that neighbourhood found it necessary to fold sheep on their ground to manure it, considering the encrease in the crop by this practice as the principal gain from the sheep, that they were like beasts of the plough, which pay no other tithe, except in the increase of the crop produced by their labour, and that the rector has his share in this profit; It was farther insisted, that the other profit arising from the sheep, the wool, had paid tithe, and that as they had not been in the parish a year, and had paid tithe of a year's wool, that was a discharge for the whole year. But the court, notwithstanding these arguments, thought the former adjudication decisively governed the present case, and decreed accordingly; and one of the judges considered (*f*) the wool-tithe as paid for the preceding year, and that as the defendant had kept the sheep for half of another year, and paid no tithe, agistment-tithe must be paid for that time, So that upon the whole it appears, that the tithe of agistment is calculable from the last time of shearing the sheep. It (*g*) seems also due for the agistment of yearling lambs.

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and had dropt their lambs in the adjoining parish of Offley, the common fields where the sheep fed lying in both parishes, it was objected, that it would be double tithing if the defendant having paid the tithe of wool and lamb to the vicar of Offley, were to pay agistment-tithe to the rector of Lilly; yet the court declared, that this was an inconvenience which the defendant had brought upon himself by not shearing a proportionable number of his ewes, and letting them yeau their lambs in Lilly. But if (*k*) the occupier of a farm in the parish of A. prescribe for common of pasture for a certain number of sheep on land in the parish of B., on which such sheep are occasionally agisted, and that tithe-wool or other satisfaction has been immemorially paid to the rector of A. as often as the sheep were shorn in that parish, and that it hath been the constant usage to shear them there; this is a good defence against the vicar of B. claiming agistment-tithe for the time the sheep were depastured in his parish, though he derives no profit as tithes from them, chiefly it seems, because the right of common (which is an incorporeal hereditament) is legally reputed as *part* of the farm, to which it is appendant or appurtenant. Otherwise it is of right of common (*l*) in *gross*, which is annexed to the person and not to land, the party intitled to which must pay agistment-tithe where the commonable land is situate.

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of the maxim *exceptio probat regulam*; since that determination forms another exception to the general principle of tithing where the agifted land is situate; which general principle was understood and presupposed in arguing the validity of the particular custom made the foundation of deviating from such principle in that particular instance. The case (*p*) was this; there being a large uninclosed common, lying between and extending itself into the several parishes of A. B. and C. and other towns, the inhabitants of which had for a time immemorial in order to avoid multiplicity of suits, permitted a sort of promiscuous intercommoning on such open pasture; the right was deemed to belong to the respective farms in each town, and taken to be part of those farms, and the owner of the cattle so fed always paid the tithes of them to the parson of that parish in which their farms were situated. The appellant rented one farm in A. and another of B., and paid tithes according to the afore-said usage to the respective incumbents of those parishes, for his cattle fed upon the common. He also occupied five acres of meadow ground in the parish of C. for which he set up a modus or customary payment of two-pence an acre, and after that rate payment had been made or tendered to the respondent, the rector of the last-mentioned parish; yet as such rector he had sued in the exchequer for tithe herbage of this meadow ground, and also for the tithe of the feed of the respondent's cattle on the open common. The court of exchequer decreed, that the defendant there should account for the modus or customary payment, and should also account for the tithes of his cattle fed upon that part of the common which lay in the parish of C., there being proof that the cattle were driven upon that part. But on the appeal, the house of Lords

(*p*) Bro. P. B. 278. Gwill. 604. Mickleburgh v. Crisp, 9 Vin. Abr. 43. S. C. Abr.

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reversed the decree, because the custom that every farmer should pay tithes to the rector of the parish in which he lived was good, and the house ordered and adjudged, that the plaintiff's bill in the court of exchequer should be dismissed without prejudice to his right, according to the modus for the five acres of meadow ground in C. the respondent's parish. This authority was relied on as in point by one at least of the judges, who decided the before-mentioned case of common appurtenant. These several decisions appear to be professedly built upon distinct grounds, the one proceeding on the validity of the custom; the other on the legal argument, that the right of common was part of the farm, to which it was appurtenant; but in effect, both these considerations will be found to contribute their joint support to each determination.

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(*q*) Degge, p. ii. c. 5.

(*r*) 1 Ld. Raym. 129. Gwill. 1029.

(*s*) Gwill. 1110. in *Boswath v. a. Scoles v. Lowther*.

Limbrick, Degge, p. ii. c. 5.

formity to the above reasoning. The parson of *Swillington* sued in the ecclesiastical court for tithes of the cattle depastured in his parish. The defendant lived in *Kippax* the next adjoining parish, and occupied a large tract of arable land there, and had besides forty acres of meadow and pasture, and four acres only of arable land in *Swillington*. The court of common pleas being applied to for a prohibition to restrain the proceeding before the spiritual judge, declared, that if there had not been arable land in *Swillington*, it was without doubt that the parson ought to have had tithes. For the reason of exempting beasts of the plough is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land; but here that reason would fail. In the same manner where a man has wood in one parish, and arable land in another; if he uses the wood in making fences for his arable land, he shall pay tithes to the parson of the parish where the wood grows: but it would be otherwise, if the wood were in the same parish. The same law prevails, where the wood grows in one parish, and is spent for fuel in the owner's house in another. They then apply these illustrations to the question before them, whether the ploughing of the four acres in *Swillington* would excuse the cattle generally from agistment tithe; and they held clearly, that it would only excuse those cattle, which ploughed the four acres, and not those which ploughed in *Kippax*. For the parson ought to have something in lieu of the tithe-herbage claimed, which compensation can only be derived from and out of the four arable acres in *Swillington*. Therefore a prohibition was granted *quoad* the cattle only, which ploughed the arable acres in *Swillington*, and as to the rest, the parson had liberty to proceed in the court below.

The

A similar principle obtains in respect to cattle formerly used for the plough, but which have ceased to be so employed. For where (t) the plaintiff as rector exhibited his bill in the exchequer against one defendant as executor of his father, and in his own right; and against another defendant for agistment tithes for depasturing and fattening their oxen, and other unprofitable cattle within the rectory; and the defendant the executor admitted, that he had assets of his testator sufficient to answer the demand, and both the defendants admitted, that they and the testator had fattened oxen upon their lands, but alledged, that some of them were first used in tillage, and afterwards fattened when turned off from the plough; the court decreed tithe-herbage to be paid for the defendants', and the testator's oxen and unprofitable cattle not used for the plough, and also for those used for the plough during time they were grazed and fattened for sale after they were turned off from the plough. From this decree the farmers appealed to the House of Lords, and there, as to that part of the decree concerning oxen once used at the plough, it was among many other arguments insisted on the behalf of the appellants, that there was the same reason to continue the exemption after the cattle had ceased to be so employed, as there could be to allow it, during the intervals when they did not draw the plough. On the other side it was urged, that the decree was supported by many prior resolutions, and was consonant to reason, because these cattle, though formerly used at the plough, ceased now to belong to it; that when the cattle feed in order to labour the parson hath a tenth of the benefit thereby produced, but when they are turned off to be grazed and fattened only for sale it is otherwise; and then tithe shall be paid for the herbage, which they eat, they being in no respect beneficial to the parson.

(t) Sho. P. C. 192. Gwill. 558. *Sandys v. Eastmond*.

in any other tithes : that this was the settled distinction in the court appealed from : and upon these grounds the decree was affirmed.

Horses kept for agricultural purposes have the same exemption, as oxen so used, from agistment-tithe ; as to this point the following case (*u*) recently occurred : The horses in question were kept by the defendant within the parish for his farm there, and were occasionally also sent to work at another farm occupied by him in an adjoining parish. The court declared, that they should have found some difficulty in deciding the case, if the horses had been habitually so used, but as their being sent to the other parish was only occasional, they clearly were within the general exemption in favour of cattle used in husbandry.

Farther (*w*), milch-cows, and young reared for the plough or pail, as well as those actually so used, are exempted from payment of this species of tithes. Nor (*x*) is any agistment tithe due for cattle fed and killed by the occupier for the use of his family in the same parish. This plea of home consumption is a very common excuse from paying tithes of different kinds extending to a variety of articles, but not of itself available to procure an abatement as to the great predial tithes of corn, and hay.

Another head of exemption arising from the description of the animals fed is the case of those (*y*), which are *feræ naturæ*, as deer, and coney; for the pasture of which no tithe is payable, at least without a special custom to create such liability.

(*u*) 2 Anstr. 498. Gwill. 1424.
Filewood v. Button,

(*w*) Degge, p. ii. c. 5. 1 Cro.
702. Gwill. 215. Green v. Hus,
ibid. 1446. arg. 1 R. A. 646,

(*x*) 1 R. A. 647. Degge, p. ii.
c. 5. Gwill. 861. Hele v. Bragg, and
ibid n. Robinson v. Tunstall.

(*y*) 2 Inst. 651. Degge, p. ii. c. 5.
Watf. c. L. f. 457.

Lastly,

Lastly, according to various authorities (a), agistment tithe is not due for saddle horses kept for the owner's pleasure, or convenience. It is difficult to find any reasonable, or strong ground of distinction between saddle horses kept for pleasure, and coach horses merely as such. Yet in a case (a) in which the defendant had agisted both his saddle and coach horses, and admitted indeed in his answer, that he had occasionally employed them to fetch coals and draw manure to lands occupied by him in another (as it seems) adjoining parish, the decree was to account for the tithe of agistment of the coach-horses, and *other* barren and unprofitable cattle. The admission in the answer could only avail according to a judicial opinion before adverted to, provided the horses had been habitually so used out of the precincts of the parish. Burn in his report of the case says, "the court were unanimously of opinion, that "coach-horses were liable to pay tithe of agistment." But it does not appear, that any difference was adverted to between them, and saddle horses, the exemption of which is so well established; so that some doubt may still perhaps be entertained as to the general liability of coach-horses to agistment-tithe, though a question so likely to occur. This appears to be the only case, in which the point was at all discussed, and perhaps not very fully in this instance, at least, the arguments have not been transmitted to us. In a much older suit (b) instituted against an innkeeper, who depastured the horses of travellers, for which there was no customary payment, the court were in doubt what decree to make for a certain rate to the parson, it not being fixed by usage, and they conceived, that they ought to allow two

(a) Degge, *ibid.* 1 Bul. 171. lowes, 3 Burn, *ecc.* 1. 420. S. C. Gwill. 1571, 2. Pothill v. May. (b) Hard. 35. Gwill. 502. Gilbert v. Ventr. 236. Bunb. 3 Gwill. 1582. v. Eversly, Degge, p. ii. c. 5. Watt. Underwood v. Gibbon. c. L. f. 455, 6.

(a) Gwill. 899. Thorpe v. Bend-

shillings in the pound on the annual value of the land, that is the tenth of such value; but they agreed clearly, that tithes were payable for the herbage eaten by travellers horses, and that it was so payable by the occupier of the lands. In those days the practice of travelling with post-horses had not commenced. At present, I apprehend, an inn-keeper and post-master would be liable to pay tithes for the herbage eaten by his own horses kept for hire, and agisted by him on land in his own occupation, or where he has common of pasture.

In the last cited case was introduced the important consideration of the manner of receiving satisfaction for tithe of agistment; what is justly and truly due is the tenth part of the grass eaten, but this is scarcely possible to be ascertained. Degge (*p*) calls it with less accuracy a tenth part of the yearly value of the ground so depastured, which is rather a mode of appretiation substituted for convenience, than the real subject of demand. He adds, that commonly a twentieth part is accepted, and that in this, as in all other tithes, the custom and usage of the place is to be observed: since, however, that author wrote, it has been (*g*) determined that a modus or customary payment of one shilling in the pound (that is a twentieth part) for pasture, according to the value of the land is a void modus, as is also a modus of one shilling in the pound, according to the rent, the same being (as Burn remarks) no other than payment of part for the whole. Watson (*r*) seems to distinguish between the occupier's own cattle, and those of strangers; laying it down that where there is no special local custom, the tenth part of the money to be received for the agistment, (meaning of

(*p*) *Ibid.*

Burnb. 174. Harrison v. Sharp.

(*g*) Burnb. 20. Smith v. Roocliiff. 3 Burn. Eccl. l. 448.(*r*) Watson C. L. 465.

the cattle of guests) is to be paid to the parson, and then he adds, that tithes of barren cattle, by which he must mean the occupier's own cattle, are due of common right, according to the value of the land after the rate of two shillings in the pound, because such tithes cannot be otherwise valued, or accounted for, but he admits that by custom or prescription such tithes may be paid in another manner, as by the acre: Where no such custom obtains, it may be difficult to suggest, and adopt a better, or more convenient mode of valuation than this of two shillings in the pound, or a tenth of the rent or value of the land; a rule which appears (r) to have generally prevailed. But (s) whether even this criterion be perfectly just, may perhaps be questioned, because the *quantum* of the rent is not in the consueance of the parson; and because as to the value of the land he ought not to be under a necessity every year of trying that fact on any difference between him and his parishioners, at the peril of costs.

Wood has been stated not to be tithable of *common right*, and consequently may seem not to belong to the present chapter: I shall briefly discuss this point. In (t) or about the seventeenth year of the reign of Edward the third, a canon was made at a provincial council under Archbishop Stratford, that tithes should be paid of *sylva cadua*. Hence (u) it is argued, that if the tithes of wood had been due of

(r) Bunb. 2. Smith v. Johnson. so decreed Hawkins v. Joyce, Marg. of Johnson v. Firebrace, Gwill. 660. though in the principal case there reported 12. 6d. only in the pound on the rent was allowed, but on what ground does not appear.

(s) See Gwill 587. Startup v. Doderidge.

(t) Degge, p. 11. c. 4.

(u) 4 Mod. 344. Gwill. 557. in Hicks v. Woodeson. See Bunb. 61. Gwill. 625. Jordan v. Colfey, tithes are due of *sylva cadua* by the law of England. Bontoa v. Hurstler, 1. Barnard, 71. But the reporter is of little credit. See however Gwill. 1561. Knight v. Halsey, seeming to imply, that wood is no longer supposed to be tithable by custom only.

common

common right, for what purpose was that canon passed? It may be answered, that the canon ought perhaps to be considered as declaratory, and not introductive of a new regulation, the term used being "*declaramus*" not "*statuimus*," so far the reasoning appears not to be conclusive. Then it is added, that there was a petition in parliament that same year, which (u) petition was couched in the following terms; "the commons pray that no man be drawn in plea in court christian for tithes of *wood, or underwood*, except in places where such tithes have used to be paid. Answer, "let it be done of this as it hath been done heretofore." But in strictness this only proves, that (w) there were districts (as the Wealds of Kent and Suffex) in which by custom no tithe of wood was or now is payable, and that therefore a county, or a hundred, not (x) a parish or a few contiguous parishes, may prescribe for that exemption. Lastly, as to its being (y) urged, that where tithes are paid for things which yield no annual profit they must be due by custom, Lord Hardwicke C. has declared that *at common law, and by general right*, copse wood or underwood is subject to tithe, because from the nature of it the law takes notice that it is to be cut and let grow again in some certain course, though that renewal be not annual. However, therefore, the point was formerly understood, we may now, it seems, conclude on this high authority, that of all such wood as is not protected by the declaratory statute of *sylva cadua*, tithes are due at common law, and by general right.

(u) Gwill. 3.

(w) It seems so understood, Degge, p. 11. c. 4. near the end.

(x) 3 Anstr. 702. Gwill. 1442.
Nagle & Edwards, Gwill. 1509.
1511. Mantell v. Paine, nor a Town
"of Wood or any other tithe," 2
Inst. 645. nor a Liberty of what

extent soever it may be Gwill. 373.

Johnson v. Bois, without specifying any kind of tithe in particular.

(y) 4 Mod. 344 Gwill. 557.

(g) Gwill. 523. Walton v. Tryon.

It is observable, that this (z) statute 45 E. 3. c. 3., which passed in the (a) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (b) ordinance, and consequently not binding. However (c) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (d) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject: But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (e) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (f) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (g), it contains nothing repugnant to the above mentioned statute, which (h) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylva cadua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hardwicke C. in giving Judgment in a (i) cause instituted chiefly for an ac-

(z) Degge, p. 11. c. 4.

(a) 1 Vin. Lect. 25.¹

(b) Ibid. 21.

(c) Degge, p. 11. c. 4.

(d) 2 Inst. 642.

(e) 2 Inst. 643. Gwill. 5, 6, 7.

(f) Gibs. t. xxx. c. 8. FNB. 119.

2 Leon. 80 In the last book it

seems supposed prior to the statute of *sylva cadua* though fixed. 2 Inst. 645. so late as 7 R. 2.

(g) 2 Inst. 645.

(h) 2 Inst. 642. Gwill. 831. in Walton v. Tryon.

(i) Gwill. 827. Walton v. Tryon.

count, and satisfaction of and for the tithes of the loppings of antient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed gross wood; this is explained to mean such trees as are (j) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (k) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber-trees as I have just described, being of the age of twenty years or above, and, thereupon being privileged by the statute, no tithes are payable either of the bodies, (l) bark, lops, or tops for whatever use (m) they are cut, with the exception of those instances in which a fraud is actually, or may probably be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (n) a man has a wood which is properly a copse wood, with a few timber-trees in it, of above twenty years growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promif-

(j) 3 Vin. lect. 28. Degge, p. 21. c. 4. 1. Infl. 53. a.

(k) Gwill. 829. pl. 470. Gwill. 133. Soby v. Molins. Degge, p. 11. c. 4. 241. & 2 Infl. 643. *contra*. but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom, see also s P. Wms. 606.

(l) Doct. & Stud. dial. 11. c. 55. 11. Co. 49. a.

(m) Though Bunb. 99. n. cites cases *contra*.

(n) Gwill. 837, 8, Lord Hardwicke cites 1 Cro. 347. Buckhurst v. Newton, n. *ibid*. If the case should be thought not fully to come up to all for which it is adduced, the doctrine may well rest upon his Lordship's own high authority, the report of the principal case in Gwill. being taken from a manuscript belonging to the family.

reversed the decree, because the custom that every farmer should pay tithes to the rector of the parish in which he lived was good, and the house ordered and adjudged, that the plaintiff's bill in the court of exchequer should be dismissed without prejudice to his right, according to the modus for the five acres of meadow ground in C. the respondent's parish. This authority was relied on as in point by one at least of the judges, who decided the before-mentioned case of common appurtenant. These several decisions appear to be professedly built upon distinct grounds, the one proceeding on the validity of the custom; the other on the legal argument, that the right of common was part of the farm, to which it was appurtenant; but in effect, both these considerations will be found to contribute their joint support to each determination.

To revert to beasts of the plough, or such as are employed for the purposes of husbandry, these (q) by the general rule of law as hath been already intimated, are exempted from the payment of agistment-tithe. An obvious and equitable restriction of the rule arises where the cattle are depastured in one parish, and used in husbandry in another. In such case (r) they are subject to this tithe in the parish, in which they are depastured. The reason is evident, provided they work in the same parish in which they are depastured, the *uberiores decime*, which are the effect of their labour falling to the lot of the same parson, who would otherwise claim the tithe of their pasture, are a satisfaction for the latter. If the cattle fed in one parish, labour in another, the parson of such other parish has the benefit, and he, where they are depastured must have an agistment-tithe or none. The court in one instance (s) apportioned this tithe of agistment in con-

(q) Degge, p. ii. c. 5.

(r) 1 Ld. Raym. 129. Gwill. 1029.

(s) Gwill. 1110. in *Boswath v. n. Scoles v. Lowther*,
Limbrick, Degge, p. ii. c. 5.

formity to the above reasoning. The parson of *Swillington* sued in the ecclesiastical court for tithes of the cattle depastured in his parish. The defendant lived in *Kippax* the next adjoining parish, and occupied a large tract of arable land there, and had besides forty acres of meadow and pasture, and four acres only of arable land in *Swillington*. The court of common pleas being applied to for a prohibition to restrain the proceeding before the spiritual judge, declared, that if there had not been arable land in *Swillington*, it was without doubt that the parson ought to have had tithes. For the reason of exempting beasts of the plough is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land; but here that reason would fail. In the same manner where a man has wood in one parish, and arable land in another; if he uses the wood in making fences for his arable land, he shall pay tithes to the parson of the parish where the wood grows: but it would be otherwise, if the wood were in the same parish. The same law prevails, where the wood grows in one parish, and is spent for fuel in the owner's house in another. They then apply these illustrations to the question before them, whether the ploughing of the four acres in *Swillington* would excuse the cattle generally from agistment tithe; and they held clearly, that it would only excuse those cattle, which ploughed the four acres, and not those which ploughed in *Kippax*. For the parson ought to have something in lieu of the tithe-herbage claimed, which compensation can only be derived from and out of the four arable acres in *Swillington*. Therefore a prohibition was granted *quoad* the cattle only, which ploughed the arable acres in *Swillington*, and as to the rest, the parson had liberty to proceed in the court below.

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lopped? he answers, that in the first case there is no tree remaining whence they may derive the privilege; in the other there is. As to the oaks in question, he admits, that if they were topped, and made pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. Therefore, this being a question of fact when he came to the decree, he offered the plaintiff an issue for a jury, to determine, namely, whether these trees were lopped before twenty years growth, or not. As to the demand for tithe of beech wood, it not being disputed, but that it was above twenty years growth; he said, that also then depended upon the question of fact whether beech be timber by the custom of the country; and his lordship thought the terms of this issue should be whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of Mickleham, of which the plaintiff was rector, are and have used to be deemed timber. This might be found according to the truth of the case, and confining it to the parish would prevent any difficulty in respect to the precise limits of the place: indeed to direct the enquiry through a wider district might be productive of contrariety, as well as uncertainty. A third issue not relative to this species of tithes was proposed to the plaintiff to elect whether he would try it or not, who having finally waived trying any of the issues, his whole bill was dismissed, but without costs. This judgment, and the arguments contained in it embrace the most material points in the law concerning the tithe of wood.

There is a short note of a (*w*) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

on this occasion : if lopped under that age, they were always deemed tithable. The same is the case of acorns from oaks of any growth. Ash and elm are upon the same footing as oaks, and so are such trees as are timber merely by the reputation, and custom of the country. Therefore (x) it has been decided, that billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards, without discriminating between oaks, and other timber-trees ; and where the trees are clearly of a species to be denominated timber, the court has declared (a) they would presume the trees to be above twenty years growth, unless the plaintiff demanding tithes proves the contrary.

The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

(x) Gwill. 84. 1 Morden v. Knight.

(a) Bunb. 126. Gwill. 645. Lloyd v. Mackworth. 3 Burn. Eccl. L. 431. Says that in many places, where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree, and if it is 24 inches in circumference, it is deemed of 20 years growth, if under that measure, it is accounted underwood.

(y) 1 Rol. R. 355. Gwill. 358. n. Laphorne v. — see Bibye v. Muxley. Bunb. 192. Gwill. 657. n. (d) *ibid.*

(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

(a) 2 P. Wms. 606. Gwill. 357. Wright v. Powle, Hob. 219. Gwill. 358. n. Guffly v. Pindar 2 Rol. R. 83, as to cherry, ash, and beech trees, and it is added, that aspe trees serve for arrows, which are for the defence of the realm.

(b) Degge, p. 11. c. 4. 11 Gwill. 543. Goodall v. Perkins.

respect, that no custom or reputation as to them appears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

Although as we have seen the bark of timber-trees is not tithable, tithes (c) shall be paid of the mast, and acorns, because these are of annual increase. But (d) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition, for in order to become tithable, they must be gathered and sold, and then (e) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (f) decided that broom made into bavins, and that wood growing in hedge-rows, are tithable. This (g) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylvæ caduæ* does not depend upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent, and Suffex. As to (h) fruit trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets

(c) Degge, p. 11. c. 4. 11 Co. 49. a.

(g) Gwill. 1508-9. 1511. Mantell v. Paine.

(d) Lit. 40. Gwill. 428. Anon.

(h) 2 Inst. 651. Baxter v. Hopes.

(e) Gwill. 1554. Knight v. Halsey.

2 Inst. 652. 1 R. A. 641. Wood. Inst. 168.

(f) Gwill. 542. Biggs v. Martin.

and faggots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolfe assigns as a reason, that it is not a new encroachment. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the sounder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both tithable. On the other hand, if a man have (i) a nursery ground, out of which he sells fruit, and other trees to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not tithable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolfe who argued this case, in his report of it mentions ashes, which at twenty years growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (j) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are titheable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case

(i) W. Jones. 416. Gwill. 501. arg. to be full of bad law, Gwill. Gibbs v. Wyborne S. C. more fully 1214. Adams v. Waller. reported 3 Cro. 526. 1 R. A. 637. (j) Hard. 380. Gwill. 515. Grant pl. 6. but this pl. is said by counsel v. Hedding.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (k) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (l) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(k) See Gwill. 829, 830. Walton v. Tryon.

(l) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes

of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decime fiunt uberiores*, that is, I suppose, by which tithes of the predial kind are encreased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (*m*) comprehends hop-poles and their barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (*n*) said to have been adjudged, that where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (*o*) if a man cuts down his copse-wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, and do not annually renew. It is true that the reason here assigned is not connected with the present topic, but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (*p*) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being

(*m*) 1 Frem. 334: Gwill. 562. "new, yet it is the husbandry is the anon. contra as to hop-poles, Gwill. "main, &c." 2 Keb. 634. Watson v. Smith.
563. Gee v. Pearce, but see 564. n. (*n*) 1 Cro. 49. in East v. Harding.
and contin. of 581, 2. S. C. Gwill. 1555. Bunb. 20 Gwill. 618. Bate v. Spracking, acc. S. P. Degg, p. 11.
c. 4. ad. fin. who cites White v. Skinner.
Arch. S. P. adm. Gwill. 1506. 1508. (*o*) 1 R. A. 637. Bedford v. Skinner.
in Mantel v. Paine, Gibf. 684. 2 (*p*) Gwill 608. anon. under
Inst. 652. "Albeit the house be Smith v. Williams.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (*k*) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (*l*) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(*k*) See Gwill. 829, 830. Walton v. Tryon.

(*l*) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes

of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

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(*m*) 1 Frem. 334. Gwill. 562. asen. contra as to hop-poles, Gwill. 563. Gee v. Pearch, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bumb. 20 Gwill. 618. Bate v. Spracking, acc. S. P. Degge, p. 11. c. 4. ad. fin. who cites White v. Arch. S. P. adm. Gwill. 1506. 1508. in Mantel v. Paine, Gibf. 684. 2 Inst. 652. "Albeit the house be

"new, yet it is the husbandry is the main, &c." 2 Keb. 634. Watfon v. Smith.

(*n*) 1 Cro. 497. in East v. Harding.

(*o*) 1 R. A. 637. Bedford v. Skinner.

(*p*) Gwill. 608. anon. under Smith v. Williams.

cut to clear the ground, and prepare it for the husbandry purposes of tillage and grazing, and the bill was dismissed.

II. For firewood (*q*) cut and consumed in a dwelling-house in the same parish, as it is generally asserted in many books, no tithes are due. This as to its origin is (*r*) ascribable to the same principle, being founded on the necessity of a habitation for carrying on the purposes of husbandry, on which tithes so much depend. Therefore, in a cause (*s*) where this defence was set up, the court declared, that as it appeared that the defendant had not any *house of husbandry* within the plaintiff's parish, but that the faggots in question were carried to the defendant's house, being out of the said parish, and there burnt, tithes were due to the plaintiff, for the same; and upon the like reasoning (*t*) it is laid down, whether authentically or not, that if a man hath a house of husbandry with lands, and demising the lands reserves the house, tithe of firewood is payable. It has (*u*) been made a question, whether this exemption of fuel is by the general law, or requiring the aid of a local custom to support it. Lord Hardwicke, C. (*v*) has given us his authoritative opinion, that wood cut to be burnt in the house of the parishioner within the parish, is exempt from tithe, not of common right, but by special custom only; and that it operates by way of customary exemption in respect of some satisfaction to the parson, which it is incumbent on the parishioners to shew. The encrease of tithes arising from husbandry to which a dwelling house is essential may be thought to afford the parson such requisite satisfaction; and his Lordship relies

(*q*) 1 R. A. 644. 656. *Ellis v. Drake*, and *Austin v. Lucas*, *ibid*, and 1 Cro. 609. S. C. 2 Inst. 652. 8. Vin. Abr. 591. *Gwill*. 610. *Roffe v. Harding*, Mo. 683.

(*x*) *Danv. Abr. t. Dismes* 597. 1 Vent. 75.

(*y*) *Gwill*. 542. *Goodall v. Perkins*.

(*i*) *Gibb*. 686. *Hutton and Croke* Justices differ as to this matter, *Hetl.* 89. *Norton v. Harmer*.

(*u*) 1 *Freem.* 334. 5. *Gwill*. 562. *anon.*

(*v*) *Gwill*. 829. *Walton v. Tryon*.

on (*uu*) a case in which, according to the cited report of it, it seems adjudged that it is not *de jure per legem terræ* that any one is discharged of tithes for wood spent in his house, or for *fencing-stuff* for hedges. This case, however, on another (*w*) occasion having been cited at the bar was not thought decisive of the question, the court declining to come to any resolution upon the point, and stating that there were opinions both ways as to *fuel* where there was no custom; but they previously held that *hop-poles and wood for fences* were not tithable on general principles, and yet the other case seems to include them, as well as firewood. The truth is very numerous authorities, some of which are above cited, speak often indiscriminately of wood used for agricultural purposes, and for domestic fuel, as exempt from tithes, without any intimation that such exemptions depend on local particular usage, and on the contrary seem (*x*) to refer them to the common law of the land, and these exemptions coincide with other parts of the system of our tithe laws. It may be added, that although in a late (*y*)

(*uu*) 3 Cro. 113. Norton v. Farmer, Gwill. *ibid.* n. but see S. C. differently reported, and finally determined, because of the custom alleged, and the verdict against such allegations, and by Croke and Yelgerton, there are divers precedents otherwise *without alledging a custom*, Hetl. 88. 110. 117. Per Croke the parson had a benefit, for he had better means of tithes, Hetl. 89. and Gibs. 636. speaks of a house of *busbandry*.

(*w*) 1 Freem. 334.

(*x*) 2 Inst. 652.

(*y*). Martell v. Paine, Gwill. 1506. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence

with Lord Hardwicke, that the exemption of fire-wood is only by special custom, Gwill. 965. and n. 965. and n. Erskine v. Ruffe. Both these great judges insist on the case in 3 Cro. 113. without adverting to the report of it in Hetley, which seems to make the other way, the C. B. quotes many other cases for and against his opinion, some of which I have not found, and some are not reported as to this matter. In Thomas v. the Duke of Beaufort, Gwill. 969. n. a custom for the exemption is stated in the answer, but does not appear to have been proved. Can the allegation or surmise avail without the proof? See 2 Keb. 634. Watson v. Smith.

case,

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Albot v. Hicks, 1028. Ellis v. Fenner, 700. Bree v. Nixon v. Browne.

(a) 2 Keb. 734. Watfon v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill. 610. Roffe 577. Cee v. Smith, Gibb. 656.

Tithe (*b*) of wood is a predial tithe: it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *whom*

(*b*) Gwill. 830. Walton v. deemed good.
Tryon.

(*d*) Gwill. 581. Gee v. Pepph.

(*c*) Degge, p. ii. c. 4. ad fin.
See however Gwill. 1561. Knight
v. Halley, and qu. whether a cus-
tom to set out wood standing by
such measurement, would now be

(*e*) Gwill. 700. n. Brabourne
v. Eyres

(*f*) Gwill. 700. Bree v. Drew,
701. Waterman v. Jones.

(*g*) 3 Eccl. L. 460.

the tithe becomes due, that is, at the time of felling. In a case, (b) therefore, where the court declared, that tithes in kind were due for wood converted into charcoal, and decreed accordingly against the defendant, who was the purchaser of log-trees, and loppings and toppings of other trees for that purpose, we may observe that he had confessed by his answer that he *felled* the wood so converted, by which it appears to have been purchased standing, though still it may seem strange, that he should pay the tithe of the value of the charcoal, if such be the meaning of the decree, instead of the wood unmanufactured*.

V. I proceed to an article of great importance to the tithe owner in parts, where the growth of it is cultivated, that of *hops*. They have already been taken notice of as falling under the class or division of small tithes; whether the plant be indigenous in this island, or not, the cultivation of it for use has been comparatively stiled modern, and in (i) many cases been judiciously observed to have been introduced within the time of legal memory, which is carried so far back as the reign of Richard the first. Hops, therefore, stand upon the same footing as other things of late introduction. In a (j) judicial argument of chief baron Comyns, they are ranked with hemp, saffron, and tobacco, and it is declared all such *new* things shall be *minuta decimæ*. Accordingly it has been in two (k) distinct cases decided, that a *modus*, or established custom of paying a definite pecuniary sum in lieu and satisfaction of the tithe of hops, *being a late thing*, is a void custom, and not

(b) Gwill. 577. Coe v. Smith.

• This is the same case, the correctness of which is in a note above impeached, in making the owner of cattle depastured, instead of the occupier of the agisted land, liable to agistment tithe.

(i) Cited in Knight v. Halfey. Gwill. 1531—1565.

(j) Com. R. 638. Wallis v. Payne. Gwill. 1557.

(k) Sid. 443. Crouch v. Refden. Gwill. 563. Gee v. Pearch. Gwill. 1557.

warranted by law, and the court taking effective cognisance that hops were not of sufficient antiquity to be the specific subject of a modus. But (l) hops, as well as other articles of novel introduction, may be covered by a modus for all small tithes in general, which operates to discharge (m) the land where they grow.

Tithes of hops as being of the predial kind must be duly set out; the proper way of doing this was the subject of much debate in a (n) late cause respecting this species of tithe within the parish of Farnham in Surrey. That suit in the form of it was an action by the occupier of the land against the tithe-owner for neglecting to take away his tithes of hops, after they were duly set out according to the usage of the place. The question was, whether this usage, which was proved to have existed for a great length of time within the parish, of setting apart every tenth row, whenever the hops were planted in equal rows, and every tenth hill when they were planted in unequal rows, and in conformity to which the tithes in question were proved to have been set out, was or was not available to the occupier, as a valid and legal custom. Evidence was also adduced with some minuteness for the purpose of manifesting the practical expedience, if not necessity, of the custom insisted on. On the other hand, the answer in chancery of the plaintiff in the action was read, admitting his belief that the introduction, and first cultivation of hops in Farnham, and elsewhere in this kingdom, were with reference to what is termed legal time, modern, and within the time of memory; although the

(l) 1 Sid. 443. Gwill. 1557. (m) 2 Keb. 612. Crouch v. The authorities to this purpose Resden.
cited Bunb. 20. n. are not ex- (n) Knight v. Halley. Gwill.
actly to the point. Wats. c. 1531.
xlix. f. 448.

court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (o) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual encrease has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(o) Gwill. 1553, &c.

actual fraud if the small turnips were assigned to the parson ; and they declared, that if the quantity were sufficiently large, as if the growth of a whole field, or a whole acre were gathered at one time, they ought to be set out in *heaps*, and the parson to have every tenth heap. As to potatoes, which in this respect bear a strong analogy to the last mentioned product, being generally sown in considerable quantities, it has been *(t)* determined where they were brought home to the defendant's house, and placed in a brewhouse, and there measured and the tithe set out, that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are removed ; whether such separation may be accomplished by measure, or weight is not stated ; but one or other of those methods seems a juster course of proceeding than leaving them on the ground, either in computed heaps, or in parcels, each potatoe being numerically counted, inasmuch as they differ in size like turnips.

Peas, and beans have been already spoken of on two former occasions, namely, under the division of tithes into great and small, and under the head of corn and grain, when they are cut and harvested in a ripened state. It may be collected by what has been laid down under the article of hops, that when peas and beans are severed from the stem, and plucked green by the hand for the food of man, a different mode of setting them out must be pursued ; and that in this instance they are immediately on such severance tithable by measure. It is, however, *(u)* only when peas are thus gathered to sell, or to feed hogs, that they are tithable at all. If the occupier gather

(t) Gwill. 1110. Bosworth v. Limbrick.

(u) 1 R. A. 647.

who tried the cause, to the jury to find for the defendant, was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* for the most part plucked or gathered by the hand, appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (s) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be a great difference in the size, and that it would be

(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

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(1) Gwill. 1110. Bosworth v. Limbrick. (u) 1 R. A. 647.

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (*v*), trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (*w*) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (*x*) wild and (*y*) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (*z*) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking.

It is here proper to mention that it was a great question in a (*a*) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(*v*) God. rep. Can. 408.

Chapman v. Barlow.

(*w*) Gwill. 581. Lister v.

(*z*) Heth. 100. Anon.

Foy.

(*a*) Gwill. 1204-1229. Adams

(*x*) Gwill. 530. Anon.

v. Waller.

(*y*) Bunb. 183. Gwill. 657.

being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
from

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding 838. n. Abbot v. Hicks, 1028. Ellis v. Fenner, 700. Bree v. Nixon v. Browne.

(a) 2 Keb. 134. Watfon v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill. 610. Roffe 577. Coc v. Smith, Gibb. 666.

Tithe (*b*) of wood is a predial tithe : it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like ; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends ; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *whom*

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(*c*) Degge, p. ii. c. 4. ad fin.

(*e*) Gwill. 700. n. Brabourne

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701. Waterman v. Jones.

(*g*) 3 Eccl. L. 460.

the tithe becomes due, that is, at the time of felling. In a case, (b) therefore, where the court declared, that tithes in kind were due for wood converted into charcoal, and decreed accordingly against the defendant, who was the purchaser of log-trees, and loppings and toppings of other trees for that purpose, we may observe that he had confessed by his answer that he *felled* the wood so converted, by which it appears to have been purchased standing, though still it may seem strange, that he should pay the tithe of the value of the charcoal, if such be the meaning of the decree, instead of the wood unmanufactured*.

V. I proceed to an article of great importance to the tithe owner in parts, where the growth of it is cultivated, that of *hops*. They have already been taken notice of as falling under the class or division of small tithes; whether the plant be indigenous in this island, or not, the cultivation of it for use has been comparatively stiled modern, and in (i) many cases been judiciously observed to have been introduced within the time of legal memory, which is carried so far back as the reign of Richard the first. Hops, therefore, stand upon the same footing as other things of late introduction. In a (j) judicial argument of chief baron Comyns, they are ranked with hemp, saffron, and tobacco, and it is declared all such *new* things shall be *minutæ decimæ*. Accordingly it has been in two (k) distinct cases decided, that a *modus*, or established custom of paying a definite pecuniary sum in lieu and satisfaction of the tithe of hops, *being a late thing*, is a void custom, and not

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(i) Cited in *Knight v. Halsey*. Gwill. 1531—1565.

(j) Com. R. 638. *Wallis v. Payne*. Gwill. 1557.

(k) Sid. 443. *Crouch v. Redden*. Gwill. 563. *Gee v. Pearch*. Gwill. 1557.

warranted by law, and the court taking effective cognisance that hops were not of sufficient antiquity to be the specific subject of a modus. But (1) hops, as well as other articles of novel introduction, may be covered by a modus for all small tithes in general, which operates to discharge (m) the land where they grow.

Tithes of hops as being of the predial kind must be duly set out; the proper way of doing this was the subject of much debate in a (n) late cause respecting this species of tithe within the parish of Farnham in Surrey. That suit in the form of it was an action by the occupier of the land against the tithe-owner for neglecting to take away his tithes of hops, after they were duly set out according to the usage of the place. The question was, whether this usage, which was proved to have existed for a great length of time within the parish, of setting apart every tenth row, whenever the hops were planted in equal rows, and every tenth hill when they were planted in unequal rows, and in conformity to which the tithes in question were proved to have been set out, was or was not available to the occupier, as a valid and legal custom. Evidence was also adduced with some minuteness for the purpose of manifesting the practical expedience, if not necessity, of the custom insisted on. On the other hand, the answer in chancery of the plaintiff in the action was read, admitting his belief that the introduction, and first cultivation of hops in Farnham, and elsewhere in this kingdom, were with reference to what is termed legal time, modern, and within the time of memory; although the

(1) 1 Sid. 443. Gwill. 1557. (m) 2 Keb. 612. Crouch v. The authorities to this purpose Resden.
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court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (e) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual encrease has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(e) Gwill. 1553, &c.

because that is the effect of labour, and is not due of itself, and therefore, it is a good discharge: on the other hand, to pay the tenth quart of milk is not good, for that is not what is due, milk according to our law not being tithable by measure; but the chief justice held that to pay the tenth quart of milk at the parsonage house, or at any other place is good. In like manner, (w) if the custom be to carry the tithes of milk, however, separated from the nine parts, to the parsonage house, or to the church porch, such custom must be observed by the parishioner. To (x) a bill filed in the exchequer insisting on such custom of carrying the tithe milk to the church porch for the use of the parson, the defendant by his answer stated, that he had set out every tenth meal of milk in clean pans or vessels, and that the plaintiff having neglected to carry it away in a reasonable time, he, the defendant, had thrown it upon the ground, and he denied the custom alledged, and prayed an issue to try it. It was proposed, on behalf of the plaintiff, to read depositions taken in a former cause between the same parties, which was objected to, but the objection was overruled, the same question being at issue in that cause. Several witnesses deposed in support of the custom, whereupon the chief baron declared, that it was not an invariable rule in questions of this nature to refer themselves to a jury; but only where the matter is doubtful, and then take that course in cases both of modules and customs. He then summed up the evidence for the plaintiff, which appears very satisfactory and convincing in proof of the custom. Another of the barons argued, that the parish having been

(w) Bunb. 73 *Dodson v. Oliver*. It appears, Gwill. 623, S. C. that the bill was filed among other things for tithes of milk; but what fell from the Court relative thereto is not mentioned in that report. Yet Bunbury's Report seems confirmed in another place. Gwill. 826. *Carthew v. Edwards*.
(x) Gwill. 1046. *Morgan v. Neville*.

who tried the cause, to the jury to find for the defendant, was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* for the most part plucked or gathered by the hand, appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (s) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be a great difference in the size, and that it would be

(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

actual fraud if the small turnips were assigned to the parson; and they declared, that if the quantity were sufficiently large, as if the growth of a whole field, or a whole acre were gathered at one time, they ought to be set out in *heaps*, and the parson to have every tenth heap. As to potatoes, which in this respect bear a strong analogy to the last mentioned product, being generally sown in considerable quantities, it has been (r) determined where they were brought home to the defendant's house, and placed in a brewhouse, and there measured and the tithe set out, that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are removed; whether such separation may be accomplished by measure, or weight is not stated; but one or other of those methods seems a juster course of proceeding than leaving them on the ground, either in computed heaps, or in parcels, each potatoe being numerically counted, inasmuch as they differ in size like turnips.

Peas, and beans have been already spoken of on two former occasions, namely, under the division of tithes into great and small, and under the head of corn and grain, when they are cut and harvested in a ripened state. It may be collected by what has been laid down under the article of hops, that when peas and beans are severed from the stem, and plucked green by the hand for the food of man, a different mode of setting them out must be pursued; and that in this instance they are immediately on such severance tithable by measure. It is, however, (u) only when peas are thus gathered to sell, or to feed hogs, that they are tithable at all. If the occupier gather

(r) Gwill. 1110. Bosworth v. Limbrick. (u) 1 R. A. 647.

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (*v*), trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (*w*) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (*x*) wild and (*y*) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (*z*) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking.

It is here proper to mention that it was a great question in a (*a*) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(*u*) God. rep. Can. 408.

Chapman v. Barlow.

(*w*) Gwill. 581. Lister v.

(*x*) Heth. 100. Anon.

Foy.

(*z*) Gwill. 1204-1229. Adams

(*a*) Gwill. 530. Anon.

v. Waller.

(*y*) Bunb. 183. Gwill. 657.

being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
from

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Abbot v. Hicks,
Nixon v. Browne. 1028. Ellis v. Ferner, 700. Bree v.
(a) 2 Keb. 34. Watson v. Smith, Drew, 701. n. Waterman v. Jones,
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(o) Gwill. 1553, &c.

the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill. 1569, 1565.

who tried the cause, to the jury to find for the defendant, was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

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(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

recompence, or occasional composition in lieu of taking the determinate number of pounds weight in kind.

These are some of the most important points relating to the tithe of wool.

X. I now proceed to the consideration of the tithes of *young animals*, namely, *lambs, calves, kids, colts, and pigs*, being also of the class of mixt tithes.

The (o) time of tithing *lambs* is when they are fit to live without their dams, and can thrive on such food as the dam lives on, and when the occupier weans his own lambs, and not before. Several (p) attempts have been made to fix by custom a particular day for tithing lambs, as on the feast of St. Mark, and on the first day of May. In (q) one case, the court allowed, that such lambs as were able to subsist without the ewes on St. Mark's-day were to be tithed; but that such other lambs as were not then able, were to be tithed when they were able to subsist without the ewes. In (r) another case, it was referred to three neighbouring justices of the peace to inquire what was a fit time for setting forth tithe lambs in that county, who certified the first of August in their judgment to be a proper time, and the court approved of it. On (s) other occasions the court hath simply, and generally declared a custom of tithing lambs on St.

(o) Gwill 530. Croft v. Blake. Vincent. Gwill 1058. Bedford 3 Burn eccl. l. 468. Gwill. 630. v. Sambell.

Croft's case.

(q) Gwill. 579.

(p) Ibid. and Gwill. 579. (r) 3 Burn. eccl. l. 469. Gwill. Lister v. Foy, 3 Burn. eccl. l. 630

469. Gwill. 630. Heaton v. Re- (s) Gwill. 530. 3 Burn. eccl. gal. Bunb, 133. Reignolds v. l. 469 Gwill. 630. Bunb. 133

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (*v*), trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (*w*) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (*x*) wild and (*y*) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (*z*) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking.

It is here proper to mention that it was a great question in a (*a*) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(*e*) God. rep. Can. 408.

Chapman v. Barlow.

(*w*) Gwill. 581. Lister v.

(*z*) Heth. 100. Anon.

Foy.

(*a*) Gwill. 1204-1229. Adams

(*x*) Gwill. 530. Anon.

v. Waller.

(*y*) Bunb. 183. Gwill. 657.

being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
from

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Abbot v. Hicks, Nixon v. Browne. 1028. Ellis v. Fenner, 700. Bree v.

(a) 2 Keb. 734. Watfon v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill. 610. Rolfe 577. Coc v. Smith, Gibb. 686.

Tithe (*b*) of wood is a predial tithe: it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *whom*

(*b*) Gwill. 830. Walton v. deemed good.
Tryon.

(*d*) Gwill. 581. Gee v. Pepp.

(*c*) Degge, p. ii. c. 4. ad fin.

(*e*) Gwill. 700. n. Brabourne

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(*f*) Gwill. 700. Bree v. Drew,
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(*g*) 3 Eccl. 1. 460.

the tithe becomes due, that is, at the time of felling. In a case, (b) therefore, where the court declared, that tithes in kind were due for wood converted into charcoal, and decreed accordingly against the defendant, who was the purchaser of log-trees, and loppings and toppings of other trees for that purpose, we may observe that he had confessed by his answer that he *felled* the wood so converted, by which it appears to have been purchased standing, though still it may seem strange, that he should pay the tithe of the value of the charcoal, if such be the meaning of the decree, instead of the wood unmanufactured*.

V. I proceed to an article of great importance to the tithe owner in parts, where the growth of it is cultivated, that of *hops*. They have already been taken notice of as falling under the class or division of small tithes; whether the plant be indigenous in this island, or not, the cultivation of it for use has been comparatively stiled modern, and in (i) many cases been judiciously observed to have been introduced within the time of legal memory, which is carried so far back as the reign of Richard the first. Hops, therefore, stand upon the same footing as other things of late introduction. In a (j) judicial argument of chief baron Comyns, they are ranked with hemp, saffron, and tobacco, and it is declared all such *new* things shall be *minuta decima*. Accordingly it has been in two (k) distinct cases decided, that a modus, or established custom of paying a definite pecuniary sum in lieu and satisfaction of the tithe of hops, *being a late thing*, is a void custom, and not

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(i) Cited in Knight v. Halfey. Gwill. 1531—1565.

(j) Com. R. 638. Wallis v. Payne. Gwill. 1557.

(k) Sid. 443. Crouch v. Redden. Gwill. 563. Gee v. Pearce. Gwill. 1557.

warranted by law, and the court taking effective cognisance that hops were not of sufficient antiquity to be the specific subject of a modus. But (*l*) hops, as well as other articles of novel introduction, may be covered by a modus for all small tithes in general, which operates to discharge (*m*) the land where they grow.

Tithes of hops as being of the predial kind must be duly set out; the proper way of doing this was the subject of much debate in a (*n*) late cause respecting this species of tithe within the parish of Farnham in Surrey. That suit in the form of it was an action by the occupier of the land against the tithe-owner for neglecting to take away his tithes of hops, after they were duly set out according to the usage of the place. The question was, whether this usage, which was proved to have existed for a great length of time within the parish, of setting apart every tenth row, whenever the hops were planted in equal rows, and every tenth hill when they were planted in unequal rows, and in conformity to which the tithes in question were proved to have been set out, was or was not available to the occupier, as a valid and legal custom. Evidence was also adduced with some minuteness for the purpose of manifesting the practical expedience, if not necessity, of the custom insisted on. On the other hand, the answer in chancery of the plaintiff in the action was read, admitting his belief that the introduction, and first cultivation of hops in Farnham, and elsewhere in this kingdom, were with reference to what is termed legal time, modern, and within the time of memory; although the

(*l*) 1 Sid. 443. Gwill. 1557. (*m*) 2 Keb. 612. Crouch v. The authorities to this purpose Resden.
cited Barnb. 20. n. are not ex- (*n*) Knight v. Halley. Gwill.
presely to the point. Wats. c. 1531.
xlix. f. 448.

court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (e) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual encrease has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(e) Gwill. 1553, &c.

the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom*, *modus*, and *real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill. 1560, 1565.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (*k*) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (*l*) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(*k*) See Gwill. 829, 830. Walton v. Tryon.

(*l*) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes

of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

gularly

gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decime fiunt uberiores*, that is, I suppose, by which tithes of the predial kind are encreased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (*m*) comprehends hop-poles and their barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (*n*) said to have been adjudged, that where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (*o*) if a man cuts down his copse-wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, and do not annually renew. It is true that the reason here assigned is not connected with the present topic, but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (*p*) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being

(*m*) 1 Frem. 334. Gwill. 562. "new, yet it is the husbandry is the asen. contra as to hop-poles, Gwill. 563. Gee v. Pearch, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bunb. 20 Gwill. 618. Bate v. Sprackling, acc. S. P. Deggs, p. 11. c. 4. ad. fin. who cites White v. Arch. S. P. adm. Gwill. 1506. 1508. in Mantel v. Paine, Gibf. 684. 2 Inst. 652. "Albeit the house be
 "new, yet it is the husbandry is the main, &c." 2 Keb. 634. Watson v. Smith.
 (*n*) 1 Cro. 492. in East v. Harding.
 (*o*) 1 R. A. 637. Bedford v. Skinner.
 (*p*) Gwill 608. anon. under Smith v. Williams.

cut to clear the ground, and prepare it for the husbandry purposes of tillage and grazing, and the bill was dismissed.

II. For firewood (*q*) cut and consumed in a dwelling-house in the same parish, as it is generally asserted in many books, no tithes are due. This as to its origin is (*r*) ascribable to the same principle, being founded on the necessity of a habitation for carrying on the purposes of husbandry, on which tithes so much depend. Therefore, in a cause (*s*) where this defence was set up, the court declared, that as it appeared that the defendant had not any *house of husbandry* within the plaintiff's parish, but that the faggots in question were carried to the defendant's house, being out of the said parish, and there burnt, tithes were due to the plaintiff, for the same; and upon the like reasoning (*t*) it is laid down, whether authentically or not, that if a man hath a house of husbandry with lands, and demising the lands reserves the house, tithe of firewood is payable. It has (*u*) been made a question, whether this exemption of fuel is by the general law, or requiring the aid of a local custom to support it. Lord Hardwicke, C. (*v*) has given us his authoritative opinion, that wood cut to be burnt in the house of the parishioner within the parish, is exempt from tithe, not of common right, but by special custom only; and that it operates by way of customary exemption in respect of some satisfaction to the parson, which it is incumbent on the parishioners to shew. The encrease of tithes arising from husbandry to which a dwelling house is essential may be thought to afford the parson such requisite satisfaction; and his Lordship relies

(*q*) 1 R. A. 644. 656. Ellis v. Drake, and Austin v. Lucas, *ibid*, and 1 Cro. 609. S. C. 2 Inst. 652. 8. Vin. Abr. 591. Gwill. 610. Roffe v. Harding, Mo. 683.

(*r*) Danv. Abr. t. Dimes 597. 1 Vent. 75.

(*s*) Gwill. 543. Goodall v. Perkins.

(*t*) Gibb. 686. Hutton and Croke Justices differ as to this matter, Hetl. 89. Norton v. Harmer.

(*u*) 1 Freem. 334. 5. Gwill. 562. anon.

(*v*) Gwill. 829. Walton v. Tryon.

on (*uu*) a case in which, according to the cited report of it, it seems adjudged that it is not *de jure per legem terræ* that any one is discharged of tithes for wood spent in his house, or for *fencing-stuff* for hedges. This case, however, on another (*w*) occasion having been cited at the bar was not thought decisive of the question, the court declining to come to any resolution upon the point, and stating that there were opinions both ways as to *fuel* where there was no custom; but they previously held that *hop-poles and wood for fences* were not tithable on general principles, and yet the other case seems to include them, as well as firewood. The truth is very numerous authorities, some of which are above cited, speak often indiscriminately of wood used for agricultural purposes, and for domestic fuel, as exempt from tithes, without any intimation that such exemptions depend on local particular usage, and on the contrary seem (*) to refer them to the common law of the land, and these exemptions coincide with other parts of the system of our tithe laws. It may be added, that although in a late (*y*)

(*uu*) 3 Cro. 113. Norton v. Farmer, Gwill. *ibid.* n. but see S. C. differently reported, and finally determined, because of the custom alleged, and the verdict against such allegations, and by Croke and Yelverton, there are divers precedents otherwise *without alledging a custom*, Hetl. 88. 110. 117. Per Croke the parson had a benefit, for he had better means of tithes, Hetl. 89. and Gibs. 686. speaks of a house of *busbandry*.

(*w*) 1 Freem. 334.

(*) 2 Inst. 652.

(*y*). Mantell v. Paine, Gwill. 3906. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence

with Lord Hardwicke, that the exemption of fire-wood is only by special custom, Gwill. 965. and n. 965. and n. Erskine v. Ruffie. Both these great judges insist on the case in 3 Cro. 113. without adverting to the report of it in Hetley, which seems to make the other way, the C. B. quotes many other cases for and against his opinion, some of which I have not found, and some are not reported as to this matter. In Thomas v. the Duke of Beaufort, Gwill. 969. n. a custom for the exemption is stated in the answer, but does not appear to have been proved. Can the allegation or surmise avail without the proof? See 1 Keb. 634. Watson v. Smith.

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case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

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(j) Com. R. 638. Wallis v.

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actly to the point. Wats. c. 1531.
xlix. f. 448.

court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (e) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual increase has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(e) Gwill. 1553, &c.

the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill. 1569, 1565.

who tried the cause, to the jury to find for the defendant, was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* for the most part plucked or gathered by the hand, appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (s) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be a great difference in the size, and that it would be

(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

actual fraud if the small turnips were assigned to the parson; and they declared, that if the quantity were sufficiently large, as if the growth of a whole field, or a whole acre were gathered at one time, they ought to be set out in *heaps*, and the parson to have every tenth heap. As to potatoes, which in this respect bear a strong analogy to the last mentioned product, being generally sown in considerable quantities, it has been (1) determined where they were brought home to the defendant's house, and placed in a brewhouse, and there measured and the tithe set out, that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are removed; whether such separation may be accomplished by measure, or weight is not stated; but one or other of those methods seems a juster course of proceeding than leaving them on the ground, either in computed heaps, or in parcels, each potatoe being numerically counted, inasmuch as they differ in size like turnips.

Peas, and beans have been already spoken of on two former occasions, namely, under the division of tithes into great and small, and under the head of corn and grain, when they are cut and harvested in a ripened state. It may be collected by what has been laid down under the article of hops, that when peas and beans are severed from the stem, and plucked green by the hand for the food of man, a different mode of setting them out must be pursued; and that in this instance they are immediately on such severance tithable by measure. It is, however, (u) only when peas are thus gathered to sell, or to feed hogs, that they are tithable at all. If the occupier gather

(1) Gwill. 1110. Bosworth v. Limbrick. (u) 1 R. A. 647.

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (*v*) trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (*w*) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (*x*) wild and (*y*) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (*z*) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking.

It is here proper to mention that it was a great question in a (*a*) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(*v*) God. rep. Can. 408.

Chapman v. Barlow.

(*w*) Gwill. 581. Lister v.

(*z*) Heth. 100. Anon.

Foy.

(*a*) Gwill. 1204-1229. Adams

(*x*) Gwill. 530. Anon.

v. Waller.

(*y*) Bunb. 183. Gwill. 657.

being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
from

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Abbot v. Hicks, Nixon v. Browne. 1028. Ellis v. Fenner, 700. Bree v.

(a) 2 Keb. 34. Watson v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill. 610. Rolfe 577. Coc v. Smith, Gibb. 666.

Tithe (*b*) of wood is a predial tithe: it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *when*

(*b*) Gwill. 830. Walton v. Tryon. deemed good.

(*d*) Gwill. 581. Gee v. Pugh.

(*c*) Degge, p. ii. c. 4. ad fin.

(*e*) Gwill. 700. n. Brabourne

See however Gwill. 1561. Knight v. Eyres
v. Halley, and qu. whether a custom to set out wood standing by such measurement, would now be

(*f*) Gwill. 700. Bree v. Drew, 701. Waterman v. Jones.

(*g*) 3 Eccl. L. 460.

the tithe becomes due, that is, at the time of felling. In a case, (b) therefore, where the court declared, that tithes in kind were due for wood converted into charcoal, and decreed accordingly against the defendant, who was the purchaser of log-trees, and loppings and toppings of other trees for that purpose, we may observe that he had confessed by his answer that he *felled* the wood so converted, by which it appears to have been purchased standing, though still it may seem strange, that he should pay the tithe of the value of the charcoal, if such be the meaning of the decree, instead of the wood unmanufactured*.

V. I proceed to an article of great importance to the tithe owner in parts, where the growth of it is cultivated, that of *hops*. They have already been taken notice of as falling under the class or division of small tithes; whether the plant be indigenous in this island, or not, the cultivation of it for use has been comparatively stiled modern, and in (i) many cases been judiciously observed to have been introduced within the time of legal memory, which is carried so far back as the reign of Richard the first. Hops, therefore, stand upon the same footing as other things of late introduction. In a (j) judicial argument of chief baron Comyns, they are ranked with hemp, saffron, and tobacco, and it is declared all such *new* things shall be *minuta decimæ*. Accordingly it has been in two (k) distinct cases decided, that a *modus*, or established custom of paying a definite pecuniary sum in lieu and satisfaction of the tithe of hops, *being a late thing*, is a void custom, and not

(b) Gwill. 577. Coe v. Smith.
 This is the same case, the correctness of which is in a note above impeached, in making the owner of cattle depastured, instead of the occupier of the agisted land, liable to agistment tithe.

(i) Cited in Knight v. Halfey. Gwill. 1531—1565.

(j) Com. R. 638. Wallis v. Payne. Gwill. 1557.

(k) Sid. 443. Crouch v. Redden. Gwill. 563. Gee v. Pearch. Gwill. 1557.

warranted by law, and the court taking effective cognisance that hops were not of sufficient antiquity to be the specific subject of a modus. But (l) hops, as well as other articles of novel introduction, may be covered by a modus: for all small tithes in general, which operates to discharge (m) the land where they grow.

Tithes of hops as being of the predial kind must be duly set out; the proper way of doing this was the subject of much debate in a (n) late cause respecting this species of tithe within the parish of Farnham in Surrey. That suit in the form of it was an action by the occupier of the land against the tithe-owner for neglecting to take away his tithes of hops, after they were duly set out according to the usage of the place. The question was, whether this usage, which was proved to have existed for a great length of time within the parish, of setting apart every tenth row, whenever the hops were planted in equal rows, and every tenth hill when they were planted in unequal rows, and in conformity to which the tithes in question were proved to have been set out, was or was not available to the occupier, as a valid and legal custom. Evidence was also adduced with some minuteness for the purpose of manifesting the practical expedience, if not necessity, of the custom insisted on. On the other hand, the answer in chancery of the plaintiff in the action was read, admitting his belief that the introduction, and first cultivation of hops in Farnham, and elsewhere in this kingdom, were with reference to what is termed legal time, modern, and within the time of memory; although the

(l) 1 Sid. 443. Gwill. 1557. (m) 2 Keb. 612. Crouch v. The authorities to this purpose Resden.
cited Bunb. 20. n. are not ex- (n) Knight v. Halfey. Gwill.
presely to the point. Wats. c. 1531.
xlix. f. 448.

court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (o) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual encrease has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(o) Gwill. 1553, &c.

the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill. 1560, 1565.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (k) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (l) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(k) See Gwill. 829, 830. Walton v. Tryon.

(l) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes

of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

gularly

gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decime fiunt uberiores*, that is, I suppose, by which tithes of the predial kind are encreased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (*m*) comprehends hop-poles and their barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (*n*) said to have been adjudged, that where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (*o*) if a man cuts down his copse-wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, and do not annually renew. It is true that the reason here assigned is not connected with the present topic, but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (*p*) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being

(*m*) 1 Frem. 334. Gwill. 562. anon. contra as to hop-poles, Gwill. 563. Gee v. Peach, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bunb. 20 Gwill. 618. Bate v. Spracking, acc. S. P. Deggs, p. 11. c. 4. ad. fin. who cites White v. Arch. S. P. adm. Gwill. 1506. 1508. in Mantel v. Paine, Gibf. 684. 2 Inst. 652. "Albeit the house be

"new, yet it is the husbandry is the main, &c." 2 Keb. 634. Watson v. Smith.

(*n*) 1 Cro. 493. in East v. Harding.

(*o*) 1 R. A. 637. Bedford v. Skinner.

(*p*) Gwill. 608. anon. under Smith v. Williams.

It is observable, that this (z) statute 45 E. 3. c. 3., which passed in the (a) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (b) ordinance, and consequently not binding. However (c) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (d) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject: But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (e) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (f) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (g), it contains nothing repugnant to the above mentioned statute, which (h) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylva cadua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hardwicke C. in giving Judgment in a (i) cause instituted chiefly for an ac-

(z) Degge, p. 11. c. 4.

(a) 1 Vin. Lect. 25.

(b) Ibid. 21.

(c) Degge, p. 11. c. 4.

(d) 2 Inst. 643.

(e) 2 Inst. 643. Gwill. 5, 6, 7.

(f) Gibs. t. xxx. c. 2. FNB. 119.

2 Leon. 80 In the last book it

seems supposed prior to the statute of *sylva cadua* though fixed. 2 Inst. 645. so late as 7 R. 2.

(g) 2 Inst. 645.

(h) 2 Inst. 642. Gwill. 831. in *Walton v. Tryon*.

(i) Gwill. 827. *Walton v. Tryon*.

count, and satisfaction of and for the tithes of the loppings of antient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed grofs wood; this is explained to mean such trees as are (j) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (k) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber-trees as I have just described, being of the age of twenty years or above, and, thereupon being privileged by the statute, no tithes are payable either of the bodies, (l) bark, lops, or tops for whatever use (m) they are cut, with the exception of those instances in which a fraud is actually, or may probably be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (n) a man has a wood which is properly a copse wood, with a few timber-trees in it, of above twenty years growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promif-

(j) 3 Vin. lect. 28. Degge, p. 21. c. 4. 1. Infl. 53. 2.

(k) Gwill. 829. pl. 470. Gwill. 133. Soby v. Molins. Degge, p. 11. c. 4. 241. & 2 Infl. 643. *contra*. but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom, see also a P. Wms. 606.

(l) Doct. & Stud. dial. 11. c. 55. 21. Co. 49. a.

(m) Though Bunb. 99. n. cites cases *contra*.

(n) Gwill. 837, 8, Lord Hardwicke cites 1 Cro. 347. Buckhurst v. Newton, n. *ibid*. If the case should be thought not fully to come up to all for which it is adduced, the doctrine may well rest upon his Lordship's own high authority, the report of the principal case in Gwill. being taken from a manuscript belonging to the family.

cuously together, so as it is almost impossible to distinguish, and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (o) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber-trees shall privilege the whole; but if the woods are mostly of fallows and different sorts of underwood, and here and there *sparfim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (p) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

Timber (q) trees of above twenty years growth, having once acquired exemption from tithes, retain it, though at the time of felling they are become dry and rotten, fit only for firebote or fuel, and not to be used for the purposes of timber, such being called *dotards*; and though of late they may have been lopped once in every seven years, as the bodies are privileged, so are the branches. In a case

(o) 2 Leon. 79. Daws v. Mollins. but see the case as cited in Luckhurst v. Newton, 1 Cro. 347. and Gwill. 529. Turner v. Smith.

(p) Gibs. t. xxx. c. 3. 667. Ayl. par. j. can. [505, 6.] Degge, p. 11. c. 4. 3 Burn. eccl. l. 433.

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not (r) long subsequent to that in which the above resolutions were pronounced, the court again held, that the boughs of timber trees above twenty years growth were not tithable, notwithstanding the decayed state of the parent tree: but that although of a tree being once of twenty years growth and never having been lopped, and then after the twenty years being lopped, every ten or every seven years, tithes were not payable for the lops, yet if a timber-tree is lopped *before* it is of twenty years growth, (r) and afterwards it is lopped every ten or seven years, tithes shall be paid of such lops, because it had never acquired the privilege. These decisions had the ratification of Lord Hardwicke, C. in his judicial argument on the occasion above alluded to. But we find (t) him contradicting one part of the positions of Sir (u) Edward Coke, which on this, as on other subjects have in general had the sanction of subsequent determinations; namely, that tithes shall not be paid for the germins or branches which grow out of the *roots* of felled timber-trees of what age soever, for that the root is parcel of the inheritance. The contrary rule (v) his Lordship represents as having since prevailed, because great part of the copses, or underwood of the kingdom are germins from such stools of timber-trees, and the opposite doctrine would deprive the clergy of tithes of many underwoods. Then to the question, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees that have been only headed and

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There is a short note of a (w) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

(w) *Wray v. Clench*. Mo. 908.

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The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

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(y) 1 Rol. R. 355. Gwill. 358. n. Laphorne v. — see Bibye v. Huxley. Bunb. 192. Gwill. 657. n. (d) *ibid.*

(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

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Although as we have seen the bark of timber-trees is not tithable, tithes (c) shall be paid of the mast, and acorns, because these are of annual increase. But (d) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition, for in order to become tithable, they must be gathered and sold, and then (e) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (f) decided that broom made into bavons, and that wood growing in hedge-rows, are tithable. This (g) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylva cadua* does not depend upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent, and Suffex. As to (h) fruit trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets

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(e) Gwill. 1554. Knight v. Halsey.

(f) Gwill. 542. Biggs v. Martin.

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and faggots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolle assigns as a reason, that it is not a new encrease. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the sounder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both tithable. On the other hand, if a man have (i) a nursery ground, out of which he sells fruit, and other trees to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not tithable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolle who argued this case, in his report of it mentions ashes, which at twenty years growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (j) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are titheable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case

(i) W. Jones. 416. Gwill. 501. arg. to be full of bad law, Gwill. Gibbs v. Wyborne S. C. more fully 1214. Adams v. Waller. reported 3 Cro. 526. 1 R. A. 637. (j) Hard. 380. Gwill. 515. Grant pl. 6. but this pl. is said by counsel v. Hedding.

the cattle of guests) is to be paid to the parson, and then he adds, that tithes of barren cattle, by which he must mean the occupier's own cattle, are due of common right, according to the value of the land after the rate of two shillings in the pound, because such tithes cannot be otherwise valued, or accounted for, but he admits that by custom or prescription such tithes may be paid in another manner, as by the acre: Where no such custom obtains, it may be difficult to suggest, and adopt a better, or more convenient mode of valuation than this of two shillings in the pound, or a tenth of the rent or value of the land; a rule which appears (r) to have generally prevailed. But (s) whether even this criterion be perfectly just, may perhaps be questioned, because the *quantum* of the rent is not in the conscience of the parson; and because as to the value of the land he ought not to be under a necessity every year of trying that fact on any difference between him and his parishioners, at the peril of cost s.

Wood has been stated not to be tithable of *common right*, and consequently may seem not to belong to the present chapter: I shall briefly discuss this point. In (t) or about the seventeenth year of the reign of Edward the third, a canon was made at a provincial council under Archbishop Stratford, that tithes should be paid of *sylvæ caduæ*. Hence (v) it is argued, that if the tithes of wood had been due of

(r) Bunb. 1. Smith v. Johnson. so decreed Hawkins v. Joyce, Marg. of Johnson v. Firebrace, Gwill. 660. though in the principal case there reported 1s. 6d. only in the pound on the rent was allowed, but on what ground does not appear.

(s) See Gwill 587. Startup v. Doderidge.

(t) Degge, p. 11. c. 4.

(v) 4 Mod. 344. Gwill. 557. in Hicks v. Woodeson. See Bunb. 61. Gwill. 625. Jordan v. Colley, tithes are due of *sylvæ caduæ* by the law of England. Bouton v. Hurstler, 1. Barnard, 71. But the reporter is of little credit. See however Gwill, 1561. Knight v. Halfey, seeming to imply, that wood is no longer supposed to be tithable by custom only.

common

common right, for what purpose was that canon passed? It may be answered, that the canon ought perhaps to be considered as declaratory, and not introductive of a new regulation, the term used being "*declaramus*" not "*statuimus*," so far the reasoning appears not to be conclusive. Then it is added, that there was a petition in parliament that same year, which (u) petition was couched in the following terms; "the commons pray that no man be drawn in plea in court christian for tithes of *wood, or underwood*, except in places where such tithes have used to be paid. Answer, "let it be done of this as it hath been done heretofore." But in strictness this only proves, that (w) there were districts (as the Wealds of Kent and Suffex) in which by custom no tithe of wood was or now is payable, and that therefore a county, or a hundred, not (x) a parish or a few contiguous parishes, may prescribe for that exemption. Lastly, as to its being (y) urged, that where tithes are paid for things which yield no annual profit they must be due by custom, Lord Hardwicke C. has declared that *at common law, and by general right*, copse wood or underwood is subject to tithe, because from the nature of it the law takes notice that it is to be cut and let grow again in some certain course, though that renewal be not annual. However, therefore, the point was formerly understood, we may now, it seems, conclude on this high authority, that of all such wood as is not protected by the declaratory statute of *sylva cadua*, tithes are due at common law, and by general right.

(u) Gwill. 3.

(w) It seems so understood, Degge, p. 11. c. 4. near the end.

(x) 3 Anstr. 702. Gwill. 1442.
Nagle v. Edwards, Gwill. 1509.
1511. Mantell v. Paine, nor a Town
"of Wood or any other tithe," 2
Inst. 645. nor a Liberty of what

extent soever it may be Gwill. 373.
Johnson v. Bois, without specifying
any kind of tithe in particular.

(y) 4 Mod. 344 Gwill. 557.

(g) Gwill. 529. Walton v.
Tryon.

It is observable, that this (2) statute 45 E. 3. c. 3., which passed in the (a) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (b) ordinance, and consequently not binding. However (c) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (d) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject: But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (e) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (f) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (g), it contains nothing repugnant to the above mentioned statute, which (h) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylvæ cedua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hardwicke C. in giving Judgment in a (i) case instituted chiefly for an ac-

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| (2) Degge, p. 11. c. 4. | seems supposed prior to the statute |
| (a) 1 Vin. Lect. 25. | of <i>sylvæ cedua</i> though fixed. 2 Inst. |
| (b) Ibid. 21. | 645. so late as 7 R. 2. |
| (c) Degge, p. 11. c. 4. | (x) 2 Inst. 645. |
| (d) 2 Inst. 643. | (b) 2 Inst. 642. Gwill. 831. in |
| (e) 2 Inst. 643. Gwill. 5, 6, 7. | Walton v. Tryon. |
| (f) Gibs. t. xx. c. 3. FNB. 119. | (i) Gwill. 827. Walton v. Tryon. |
| 2 Leon. 80 In the last book it | |

count,

count, and satisfaction of and for the tithes of the loppings of antient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed gross wood; this is explained to mean such trees as are (j) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (k) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber-trees as I have just described, being of the age of twenty years or above, and, thereupon being privileged by the statute, no tithes are payable either of the bodies, (l) bark, lops, or tops for whatever use (m) they are cut, with the exception of those instances in which a fraud is actually, or may probably be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (n) a man has a wood which is properly a copse wood, with a few timber-trees in it, of above twenty years growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promif-

(j) 3 Vin. lect. 28. Degge, p. 21. c. 4. 1. Inst. 53. 2.

(k) Gwill. 829. pl. 470. Gwill. 133. Soby v. Molins. Degge, p. 11. c. 4. 241. & 2 Inst. 643. *contra*. but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom, see also 2 P. Wms. 606.

(l) Doct. & Stud. dial. 11. c. 55. 21. Co. 49. 2.

(m) Though Bunk. 99. n. cites cases *contra*.

(n) Gwill. 837, 8, Lord Hardwicke cites 1 Cro. 347. Buckhurst v. Newton, n. *ibid*. If the case should be thought not fully to come up to all for which it is adduced, the doctrine may well rest upon his Lordship's own high authority, the report of the principal case in Gwill. being taken from a manuscript belonging to the family.

cuously together, so as it is almost impossible to distinguish, and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (o) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber-trees shall privilege the whole; but if the woods are mostly of fallows and different sorts of underwood, and here and there *sparfim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (p) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

Timber (q) trees of above twenty years growth, having once acquired exemption from tithes, retain it, though at the time of felling they are become dry and rotten, fit only for firebote or fuel, and not to be used for the purposes of timber, such being called *dotards*; and though of late they may have been lopped once in every seven years, as the bodies are privileged, so are the branches. In a case

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and faggots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolle assigns as a reason, that it is not a new encrease. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the sounder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both tithable. On the other hand, if a man have (i) a nursery ground, out of which he sells fruit, and other trees to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not tithable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolle who argued this case, in his report of it mentions ashes, which at twenty years growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (j) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are titheable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case

(i) W. Jones. 416. Gwill. 501. arg. to be full of bad law, Gwill. Gibbs v. Wyborne S. C. more fully 1214. Adams v. Waller. reported 3 Cro. 526. 1 R. A. 637. (j) Hard. 380. Gwill. 515. Grant pl. 6. but this pl. is said by counsel v. Hedding.

the cattle of guests) is to be paid to the parson, and then he adds, that tithes of barren cattle, by which he must mean the occupier's own cattle, are due of common right, according to the value of the land after the rate of two shillings in the pound, because such tithes cannot be otherwise valued, or accounted for, but he admits that by custom or prescription such tithes may be paid in another manner, as by the acre: Where no such custom obtains, it may be difficult to suggest, and adopt a better, or more convenient mode of valuation than this of two shillings in the pound, or a tenth of the rent or value of the land; a rule which appears (r) to have generally prevailed. But (s) whether even this criterion be perfectly just, may perhaps be questioned, because the *quantum* of the rent is not in the consueance of the parson; and because as to the value of the land he ought not to be under a necessity every year of trying that fact on any difference between him and his parishioners, at the peril of cost s.

Wood has been stated not to be tithable of *common right*, and consequently may seem not to belong to the present chapter: I shall briefly discuss this point. In (t) or about the seventeenth year of the reign of Edward the third, a canon was made at a provincial council under Archbishop Stratford, that tithes should be paid of *sylva cadua*. Hence (v) it is argued, that if the tithes of wood had been due of

(r) Bunb. 1. Smith v. Johnson. so decreed Hawkins v. Joyce, Marg. of Johnson v. Firebrace, Gwill. 660. though in the principal case there reported 1s. 6d. only in the pound on the rent was allowed, but on what ground does not appear.

(s) See Gwill 587. Startup v. Doderidge.

(t) Degge, p. 11. c. 4.

(v) 4 Mod. 344. Gwill. 557. in Hicks v. Woodeson. See Bunb. 61. Gwill. 625. Jordan v. Colley, tithes are due of *sylva cadua* by the law of England. Bouton v. Hurdler, 1. Barnard, 71. But the reporter is of little credit. See however Gwill, 1561. Knight v. Halfey, seeming to imply, that wood is no longer supposed to be tithable by custom only.

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common right, for what purpose was that canon passed? It may be answered, that the canon ought perhaps to be considered as declaratory, and not introductive of a new regulation, the term used being "*declaramus*" not "*statuimus*," so far the reasoning appears not to be conclusive. Then it is added, that there was a petition in parliament that same year, which (u) petition was couched in the following terms; "the commons pray that no man be drawn in plea in court christian for tithes of *wood, or underwood*, except in places where such tithes have used to be paid. Answer, "let it be done of this as it hath been done heretofore." But in strictness this only proves, that (w) there were districts (as the Wealds of Kent and Suffex) in which by custom no tithe of wood was or now is payable, and that therefore a county, or a hundred, not (x) a parish or a few contiguous parishes, may prescribe for that exemption. Lastly, as to its being (y) urged, that where tithes are paid for things which yield no annual profit they must be due by custom, Lord Hardwicke C. has declared that *at common law, and by general right*, copse wood or underwood is subject to tithe, because from the nature of it the law takes notice that it is to be cut and let grow again in some certain course, though that renewal be not annual. However, therefore, the point was formerly understood, we may now, it seems, conclude on this high authority, that of all such wood as is not protected by the declaratory statute of *sylva cadua*, tithes are due at common law, and by general right.

(u) Gwill. 3. extent soever it may be Gwill. 373.
 (w) If seems so understood, Johnson v. Bois, without specifying
 Degge, p. 11. c. 4. near the end. any kind of tithe in particular.
 (x) 3 Anfr. 702. Gwill. 1442. (y) 4 Mod. 344 Gwill. 557.
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It is observable, that this (z) statute 45 E. 3. c. 3., which passed in the (a) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (b) ordinance, and consequently not binding. However (c) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (d) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject: But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (e) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (f) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (g), it contains nothing repugnant to the above mentioned statute, which (h) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylva cadua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hardwicke C. in giving Judgment in a (i) cause instituted chiefly for an ac-

(z) Degge, p. 11. c. 4.

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(b) Ibid. 21.

(c) Degge, p. 11. c. 4.

(d) 2 Inst. 643.

(e) 2 Inst. 643. Gwill. 5, 6, 7.

(f) Gibs. t. xxx. c. 3. FNB. 119.

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(i) Gwill. 827. Walton v. Tryon.

count, and satisfaction of and for the tithes of the loppings of antient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed gross wood; this is explained to mean such trees as are (*j*) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (*k*) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber-trees as I have just described, being of the age of twenty years or above, and, thereupon being privileged by the statute, no tithes are payable either of the bodies, (*l*) bark, lops, or tops for whatever use (*m*) they are cut, with the exception of those instances in which a fraud is actually, or may probably be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (*n*) a man has a wood which is properly a copse wood, with a few timber-trees in it, of above twenty years growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promif-

(*j*) 3 Vin. lect. 28. Degge, p. 21. c. 4. 1. Inst. 53. 2.

(*k*) Gwill. 829. pl. 470. Gwill. 133. Soby v. Molins. Degge, p. 11. c. 4. 241. & 2 Inst. 643. *contra*. but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom, see also s P. Wms. 606.

(*l*) Doct. & Stud. dial. 11. c. 55. 21. Co. 49. 2.

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(*n*) Gwill. 837, 8, Lord Hardwicke cites 1 Cro. 347. Buckhurst v. Newton, n. *ibid*. If the case should be thought not fully to come up to all for which it is adduced, the doctrine may well rest upon his Lordship's own high authority, the report of the principal case in Gwill. being taken from a manuscript belonging to the family.

cuously together, so as it is almost impossible to distinguish, and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (o) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber-trees shall privilege the whole; but if the woods are mostly of fallows and different sorts of underwood, and here and there *sparfim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (p) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

Timber (q) trees of above twenty years growth, having once acquired exemption from tithes, retain it, though at the time of felling they are become dry and rotten, fit only for firebote or fuel, and not to be used for the purposes of timber, such being called *dotards*; and though of late they may have been lopped once in every seven years; as the bodies are privileged, so are the branches. In a case

(o) 2 Leon. 79. Daws v. Mollins. but see the case 'as cited in Euckhurst v. Newton, 1 Cro. 347. and Gwill. 529. Turner v. Smith.

(p) Gibs. t. xxx. c. 3. 667. Ayl. par. j. can. [505, 6.] Degge, p. 11. c. 4. 3 Burn. eccl. l. 433.

But see 1 Sid. 300. Cornell v. Haws. Gwill. 834.

(q) 1 Cro. 477. Ram v. Patenson. Gwill. 833. Mo. 908. Gwill. 542. Biggs v. Martin, contr. But see Gwill. 834. See also Witherington v. Harris. Gwill. 584.

not (r) long subsequent to that in which the above resolutions were pronounced, the court again held, that the boughs of timber trees above twenty years growth were not titihable, notwithstanding the decayed state of the parent tree: but that although of a tree being once of twenty years growth and never having been lopped, and then after the twenty years being lopped, every ten or every seven years, tithes were not payable for the lops, yet if a timber-tree is lopped *before* it is of twenty years growth, (s) and afterwards it is lopped every ten or seven years, tithes shall be paid of such lops, because it had never acquired the privilege. These decisions had the ratification of Lord Hardwicke, C. in his judicial argument on the occasion above alluded to. But we find (t) him contradicting one part of the positions of Sir (u) Edward Coke, which on this, as on other subjects have in general had the sanction of subsequent determinations; namely, that tithes shall not be paid for the germins or branches which grow out of the *roots* of felled timber-trees of what age soever, for that the root is parcel of the inheritance. The contrary rule (v) his Lordship represents as having since prevailed, because great part of the copses, or underwood of the kingdom are germins from such stools of timber-trees, and the opposite doctrine would deprive the clergy of tithes of many underwoods. Then to the question, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees that have been only headed and

(r) Mo. 908. *Broke v. Rogers*.
Gwill. 833.

(s) Gwill. 832.

(t) But what if it ceases to be
lopped for twenty years successively?
It is said to become timber, and
privileged, 1 R. A. 640. *Degge*,
p. 11. c. 4. *tamen quare*. See Gwill.
165.

(u) 2 Inst. 643.

(v) Wood growing on stubs, or
stems is titihable, Gwill. 529. *Tur-*
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lopped? he answers, that in the first case there is no tree remaining whence they may derive the privilege; in the other there is. As to the oaks in question, he admits, that if they were topped, and made pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. Therefore, this being a question of fact when he came to the decree, he offered the plaintiff an issue for a jury, to determine, namely, whether these trees were lopped before twenty years growth, or not. As to the demand for tithe of beech wood, it not being disputed, but that it was above twenty years growth; he said, that also then depended upon the question of fact whether beech be timber by the custom of the country; and his lordship thought the terms of this issue should be whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of Mickleham, of which the plaintiff was rector, are and have used to be deemed timber. This might be found according to the truth of the case, and confining it to the parish would prevent any difficulty in respect to the precise limits of the place: indeed to direct the enquiry through a wider district might be productive of contrariety, as well as uncertainty. A third issue not relative to this species of tithes was proposed to the plaintiff to elect whether he would try it or not, who having finally waived trying any of the issues, his whole bill was dismissed, but without costs. This judgment, and the arguments contained in it embrace the most material points in the law concerning the tithe of wood.

There is a short note of a (*w*) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

on this occasion: if lopped under that age, they were always deemed tithable. The same is the case of acorns from oaks of any growth. Ash and elm are upon the same footing as oaks, and so are such trees as are timber merely by the reputation, and custom of the country. Therefore (x) it has been decided, that billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards, without discriminating between oaks, and other timber-trees; and where the trees are clearly of a species to be denominated timber, the court has declared (a) they would presume the trees to be above twenty years growth, unless the plaintiff demanding tithes proves the contrary.

The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

(x) Gwill. 84. 1 Morden v. Knight.

(a) Bunb. 126. Gwill. 645. Lloyd v. Mackworth. 3 Burn. Eccl. L. 431. Says that in many places, where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree, and if it is 24 inches in circumference, it is deemed of 20 years growth, if under that measure, it is accounted underwood.

(y) 1 Rol. R. 355. Gwill. 358. n. Laphorne v. — see Bibye v. Huxley. Bunb. 192. Gwill. 657. n. (d) *ibid.*

(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

(a) 2 P. Wms. 606. Gwill. 357. Wright v. Powle, Hob. 219. Gwill. 358. n. Guffly v. Pindar 2 Rol. R. 83, as to cherry, ash, and beech trees, and it is added, that aspen trees serve for arrows, which are for the defence of the realm.

(b) Degge, p. 11. c. 4. 11 Gwill. 543. Goodall v. Perkins.

respect, that no custom or reputation as to them appears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

Although as we have seen the bark of timber-trees is not tithable, tithes (c) shall be paid of the mast, and acorns, because these are of annual increase. But (d) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition, for in order to become tithable, they must be gathered and sold, and then (e) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (f) decided that broom made into bavins, and that wood growing in hedge-rows, are tithable. This (g) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylva cadua* does not depend upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent, and Suffex. As to (h) fruit trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets

(c) Degge, p. 11. c. 4. 11 Co. 49. a.

(d) Lit. 40. Gwill. 428. Anon.

(e) Gwill. 1554. Knight v. Halley.

(f) Gwill. 542. Biggs v. Martin.

(g) Gwill. 1508-9. 1511. Mantell v. Paine.

(h) 2 Inst. 651. Baxter v. Hopes, 2 Inst. 652. 1 R. A. 641. Wood Inst. 168.

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cuously together, so as it is almost impossible to distinguish, and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (o) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber-trees shall privilege the whole; but if the woods are mostly of fallows and different sorts of underwood, and here and there *sparfim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (p) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

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not (r) long subsequent to that in which the above resolutions were pronounced, the court again held, that the boughs of timber trees above twenty years growth were not tithable, notwithstanding the decayed state of the parent tree: but that although of a tree being once of twenty years growth and never having been lopped, and then after the twenty years being lopped, every ten or every seven years, tithes were not payable for the lops, yet if a timber-tree is lopped *before* it is of twenty years growth, (s) and afterwards it is lopped every ten or seven years, tithes shall be paid of such lops, because it had never acquired the privilege. These decisions had the ratification of Lord Hardwicke, C. in his judicial argument on the occasion above alluded to. But we find (t) him contradicting one part of the positions of Sir (u) Edward Coke, which on this, as on other subjects have in general had the sanction of subsequent determinations; namely, that tithes shall not be paid for the germins or branches which grow out of the *roots* of felled timber-trees of what age soever, for that the root is parcel of the inheritance. The contrary rule (v) his Lordship represents as having since prevailed, because great part of the copses, or underwood of the kingdom are germins from such stools of timber-trees, and the opposite doctrine would deprive the clergy of tithes of many underwoods. Then to the question, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees that have been only headed and

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(s) Gwill. 832.

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There is a short note of a (*w*) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

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The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

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(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

(a) 2 P. Wms. 606. Gwill. 357. Wright v. Powle, Hob. 219. Gwill. 358. n. Guffly v. Pindar 2 Rol. R. 83, as to cherry, ash, and beech trees, and it is added, that aspen trees serve for arrows, which are for the defence of the realm.

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Lastly, according to various authorities (z), agistment tithe is not due for saddle horses kept for the owner's pleasure, or convenience. It is difficult to find any reasonable, or strong ground of distinction between saddle horses kept for pleasure, and coach horses merely as such. Yet in a case (a) in which the defendant had agisted both his saddle and coach horses, and admitted indeed in his answer, that he had occasionally employed them to fetch coals and draw manure to lands occupied by him in another (as it seems) adjoining parish, the decree was to account for the tithe of agistment of the coach-horses, and *other* barren and unprofitable cattle. The admission in the answer could only avail according to a judicial opinion before adverted to, provided the horses had been habitually so used out of the precincts of the parish. Burn in his report of the case says, "the court were unanimously of opinion, that "coach-horses were liable to pay tithe of agistment." But it does not appear, that any difference was adverted to between them, and saddle horses, the exemption of which is so well established; so that some doubt may still perhaps be entertained as to the general liability of coach-horses to agistment-tithe, though a question so likely to occur. This appears to be the only case, in which the point was at all discussed, and perhaps not very fully in this instance, at least, the arguments have not been transmitted to us. In a much older suit (b) instituted against an innkeeper, who depastured the horses of travellers, for which there was no customary payment, the court were in doubt what decree to make for a certain rate to the parson, it not being fixed by usage, and they conceived, that they ought to allow two

(z) Degge, *ibid.* 1 Bul. 171. lowes, 3 Burn, eccl. l. 420. S. C. Gwill. 1571. 2. Pothill v. May. (b) Hard. 35. Gwill. 502. Gilbert v. Ventr. 236. Bunb. 3 Gwill. 1582. v. Everly, Degge, p. ii. c. 5. Watf. Underwood v. Gibbon. c. L. f. 455, 6.

(a) Gwill. 899. Thorpe v. Bend-

shillings in the pound on the annual value of the land, that is the tenth of such value; but they agreed clearly, that tithes were payable for the herbage eaten by travellers horses, and that it was so payable by the occupier of the lands. In those days the practice of travelling with post-horses had not commenced. At present, I apprehend, an inn-keeper and post-master would be liable to pay tithes for the herbage eaten by his own horses kept for hire, and agisted by him on land in his own occupation, or where he has common of pasture.

In the last cited case was introduced the important consideration of the manner of receiving satisfaction for tithe of agistment; what is justly and truly due is the tenth part of the grass eaten, but this is scarcely possible to be ascertained. Degge (p) calls it with less accuracy a tenth part of the yearly value of the ground so depastured, which is rather a mode of appretiation substituted for convenience, than the real subject of demand. He adds, that commonly a twentieth part is accepted, and that in this, as in all other tithes, the custom and usage of the place is to be observed: since, however, that author wrote, it has been (q) determined that a modus or customary payment of one shilling in the pound (that is a twentieth part) for pasture, according to the value of the land is a void modus, as is also a modus of one shilling in the pound, according to the rent, the same being (as Burn remarks) no other than payment of part for the whole. Watson (r) seems to distinguish between the occupier's own cattle, and those of strangers; laying it down that where there is no special local custom, the tenth part of the money to be received for the agistment, (meaning of

(p) *Ibid.*Burnb. 174. *Harrison v. Sharp.*(q) Burnb. 20. *Smith v. Roocliiff.* 3 Burn. Eccl. l. 448.

(r) Watson C. L. 465.

the cattle of guests) is to be paid to the parson, and then he adds, that tithes of barren cattle, by which he must mean the occupier's own cattle, are due of common right, according to the value of the land after the rate of two shillings in the pound, because such tithes cannot be otherwise valued, or accounted for, but he admits that by custom or prescription such tithes may be paid in another manner, as by the acre: Where no such custom obtains, it may be difficult to suggest, and adopt a better, or more convenient mode of valuation than this of two shillings in the pound, or a tenth of the rent or value of the land; a rule which appears (r) to have generally prevailed. But (s) whether even this criterion be perfectly just, may perhaps be questioned, because the *quantum* of the rent is not in the conformance of the parson; and because as to the value of the land he ought not to be under a necessity every year of trying that fact on any difference between him and his parishioners, at the peril of cost s.

Wood has been stated not to be tithable of *common right*, and consequently may seem not to belong to the present chapter: I shall briefly discuss this point. In (t) or about the seventeenth year of the reign of Edward the third, a canon was made at a provincial council under Archbishop Stratford, that tithes should be paid of *sylva cadua*. Hence (v) it is argued, that if the tithes of wood had been due of

(r) Bunb. 1. Smith v. Johnson. so decreed Hawkins v. Joyce, Marg. of Johnson v. Firebrace, Gwill. 660. though in the principal case there reported 1s. 6d. only in the pound on the rent was allowed, but on what ground does not appear.

(s) See Gwill 587. Startup v. Doderidge.

(t) Degge, p. 11. c. 4.

(v) 4 Mod. 344. Gwill. 557. in Hicks v. Woodeson. See Bunb. 61. Gwill. 625. Jordan v. Colley, tithes are due of *sylva cadua* by the law of England. Bouton v. Hurdler, 1. Barnard, 71. But the reporter is of little credit. See however Gwill. 1561. Knight v. Halfey, seeming to imply, that wood is no longer supposed to be tithable by custom only.

common

common right, for what purpose was that canon passed? It may be answered, that the canon ought perhaps to be considered as declaratory, and not introductive of a new regulation, the term used being "*declaramus*" not "*statuimus*," so far the reasoning appears not to be conclusive. Then it is added, that there was a petition in parliament that same year, which (u) petition was couched in the following terms; "the commons pray that no man be drawn in plea in court christian for tithes of *wood, or underwood*, except in places where such tithes have used to be paid. Answer, "let it be done of this as it hath been done heretofore." But in strictness this only proves, that (w) there were districts (as the Wealds of Kent and Suffex) in which by custom no tithe of wood was or now is payable, and that therefore a county, or a hundred, not (x) a parish or a few contiguous parishes, may prescribe for that exemption. Lastly, as to its being (y) urged, that where tithes are paid for things which yield no annual profit they must be due by custom, Lord Hardwicke C. has declared that *at common law, and by general right*, copse wood or underwood is subject to tithe, because from the nature of it the law takes notice that it is to be cut and let grow again in some certain course, though that renewal be not annual. However, therefore, the point was formerly understood, we may now, it seems, conclude on this high authority, that of all such wood as is not protected by the declaratory statute of *sylva cadua*, tithes are due at common law, and by general right.

(u) Gwill. 3.

(w) It seems so understood, Degge, p. 11. c. 4. near the end.

(x) 3 Anstr. 702. Gwill. 1442. Nagle v. Edwards, Gwill. 1509. 1511. Mantell v. Paine, nor a Town "of Wood or any other tithe," 2 Inst. 645. nor a Liberty of what

extent soever it may be Gwill. 373. Johnson v. Bois, without specifying any kind of tithe in particular.

(y) 4 Mod. 344 Gwill. 557.

(g) Gwill. 523. Walton v. Tryon.

It is observable, that this (z) statute 45 E. 3. c. 3., which passed in the (a) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (b) ordinance, and consequently not binding. However (c) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (d) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject: But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (e) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (f) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (g), it contains nothing repugnant to the above mentioned statute, which (h) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylva cadua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hardwicke C. in giving Judgment in a (i) cause instituted chiefly for an ac-

(z) Degge, p. 21. c. 4.

(a) 1 Vin. Lect. 25.

(b) Ibid. 21.

(c) Degge, p. 21. c. 4.

(d) 2 Inst. 643.

(e) 2 Inst. 643. Gwill. 5, 6, 7.

(f) Gibs. t. xxx. c. 3. FNB. 119.

2 Leon. 80 In the last book it

seems supposed prior to the statute of *sylva cadua* though fixed. 2 Inst. 645. so late as 7 R. 2.

(g) 2 Inst. 645.

(h) 2 Inst. 642. Gwill. 831. in Walton v. Tryon.

(i) Gwill. 827. Walton v. Tryon.

count, and satisfaction of and for the tithes of the loppings of antient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed gross wood; this is explained to mean such trees as are (j) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (k) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber-trees as I have just described, being of the age of twenty years or above, and, thereupon being privileged by the statute, no tithes are payable either of the bodies, (l) bark, lops, or tops for whatever use (m) they are cut, with the exception of those instances in which a fraud is actually, or may probably be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (n) a man has a wood which is properly a copse wood, with a few timber-trees in it, of above twenty years growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promif-

(j) 3 Vin. lect. 28. Degge, p. 21. c. 4. 1. Inst. 53. 2.

(k) Gwill. 829. pl. 470. Gwill. 133. Soby v. Molins. Degge, p. 11. c. 4. 241. & 2 Inst. 643. *contra*. but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom, see also a P. Wms. 606.

(l) Doct. & Stud. dial. 11. c. 55. 21. Co. 49. 2.

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(x) Degge, *ibid.* 1 Bul. 171. *lowes*, 3 Burn, eccl. l. 420. S. C. Gwill. 1571. 2. *Pothill v. May*. (b) Hard. 35. Gwill. 502. *Gilbert v. Ventr.* 236. Bunb. 3 Gwill. 1582. *v. Everly*, Degge, p. ii. c. 5. *Watt. Underwood v. Gibbon*. c. L. f. 455, 6.

(a) Gwill. 899. *Thorpe v. Bend*.

shillings in the pound on the annual value of the land, that is the tenth of such value; but they agreed clearly, that tithes were payable for the herbage eaten by travellers horses, and that it was so payable by the occupier of the lands. In those days the practice of travelling with post-horses had not commenced. At present, I apprehend, an inn-keeper and post-master would be liable to pay tithes for the herbage eaten by his own horses kept for hire, and agisted by him on land in his own occupation, or where he has common of pasture.

In the last cited case was introduced the important consideration of the manner of receiving satisfaction for tithe of agistment; what is justly and truly due is the tenth part of the grass eaten, but this is scarcely possible to be ascertained. Degge (p) calls it with less accuracy a tenth part of the yearly value of the ground so depastured, which is rather a mode of appretiation substituted for convenience, than the real subject of demand. He adds, that commonly a twentieth part is accepted, and that in this, as in all other tithes, the custom and usage of the place is to be observed: since, however, that author wrote, it has been (q) determined that a modus or customary payment of one shilling in the pound (that is a twentieth part) for pasture, according to the value of the land is a void modus, as is also a modus of one shilling in the pound, according to the rent, the same being (as Burn remarks) no other than payment of part for the whole. Watson (r) seems to distinguish between the occupier's own cattle, and those of strangers; laying it down that where there is no special local custom, the tenth part of the money to be received for the agistment, (meaning of

(p) Ibid.

Burnb. 174. Harrison v. Sharp.

(q) Burnb. 20. Smith v. Roocliff. 3 Burn. Eccl. l. 448.

(r) Watson C. L. 465.

the cattle of guests) is to be paid to the parson, and then he adds, that tithes of barren cattle, by which he must mean the occupier's own cattle, are due of common right, according to the value of the land after the rate of two shillings in the pound, because such tithes cannot be otherwise valued, or accounted for, but he admits that by custom or prescription such tithes may be paid in another manner, as by the acre: Where no such custom obtains, it may be difficult to suggest, and adopt a better, or more convenient mode of valuation than this of two shillings in the pound, or a tenth of the rent or value of the land; a rule which appears (r) to have generally prevailed. But (s) whether even this criterion be perfectly just, may perhaps be questioned, because the *quantum* of the rent is not in the conuſance of the parson; and because as to the value of the land he ought not to be under a neceſſity every year of trying that fact on any difference between him and his pariſhioners, at the peril of coſt s.

Wood has been ſtated not to be tithable of *common right*, and conſequently may ſeem not to belong to the preſent chapter: I ſhall briefly diſcuſs this point. In (t) or about the ſeventeenth year of the reign of Edward the third, a canon was made at a provincial council under Archbiſhop Stratford, that tithes ſhould be paid of *ſylvæ cædua*. Hence (v) it is argued, that if the tithes of wood had been due of

(r) Bunb. 1. Smith v. Johnſon. ſo decreed Hawkins v. Joyce, Marg. of Johnſon v. Firebrace, Gwill. 660. though in the principal caſe there reported 12. 6d. only in the pound on the rent was allowed, but on what ground does not appear.

(s) See Gwill. 587. Startup v. Doderidge.

(t) Degge, p. 11. c. 4.

(v) 4 Mod. 344. Gwill. 557. in Hicks v. Woodeson. See Bunb. 61. Gwill. 625. Jordan v. Colſey, tithes are due of *ſylvæ cædua* by the law of England. Bontou v. Hurſler, 1. Barnard, 71. But the reporter is of little credit. See however Gwill. 1561. Knight v. Halfey, ſeeming to imply, that wood is no longer ſuppoſed to be tithable by cuſtom only.

common

common right, for what purpose was that canon passed? It may be answered, that the canon ought perhaps to be considered as declaratory, and not introductive of a new regulation, the term used being "*declaramus*" not "*statuimus*," so far the reasoning appears not to be conclusive. Then it is added, that there was a petition in parliament that same year, which (u) petition was couched in the following terms; "the commons pray that no man be drawn in plea in court christian for tithes of *wood, or underwood*, except in places where such tithes have used to be paid. Answer, "let it be done of this as it hath been done heretofore." But in strictness this only proves, that (w) there were districts (as the Wealds of Kent and Sussex) in which by custom no tithe of wood was or now is payable, and that therefore a county, or a hundred, not (x) a parish or a few contiguous parishes, may prescribe for that exemption. Lastly, as to its being (y) urged, that where tithes are paid for things which yield no annual profit they must be due by custom, Lord Hardwicke C. has declared that *at common law, and by general right*, copse wood or underwood is subject to tithe, because from the nature of it the law takes notice that it is to be cut and let grow again in some certain course, though that renewal be not annual. However, therefore, the point was formerly understood, we may now, it seems, conclude on this high authority, that of all such wood as is not protected by the declaratory statute of *sylva cadua*, tithes are due at common law, and by general right.

(u) Gwill. 3.

(w) It seems so understood, Degge, p. 11. c. 4. near the end.

(x) 3 Anstr. 702. Gwill. 1442. Nagle & Edwards, Gwill. 1509. 1511. Mantell v. Paine, nor a Town "of Wood or any other tithe," 2 Inst. 645. nor a Liberty of what

extent soever it may be Gwill. 373. Johnson v. Bois, without specifying any kind of tithe in particular.

(y) 4 Mod. 344 Gwill. 557.

(g) Gwill. 828. Walton v. Tryon.

It is observable, that this (2) statute 45 E. 3. c. 3., which passed in the (a) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (b) ordinance, and consequently not binding. However (c) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (d) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject: But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (e) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (f) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (g), it contains nothing repugnant to the above mentioned statute, which (h) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylvæ cedua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hardwicke C. in giving Judgment in a (i) case instituted chiefly for an ac-

(2) Degge, p. 11. c. 4.

(a) 1 Vin. Lect. 25.

(b) Ibid. 21.

(c) Degge, p. 11. c. 4.

(d) 2 Inst. 643.

(e) 2 Inst. 643. Gwill. 5, 6, 7.

(f) Gibs. t. xxx. c. 3. FNB. 119.

2 Leon. 80 In the last book it

seems supposed prior to the statute of *sylvæ cedua* though fixed. 2 Inst. 645. so late as 7 R. 2.

(g) 2 Inst. 645.

(h) 2 Inst. 642. Gwill. 831. in *Walton v. Tryon*.

(i) Gwill. 827. *Walton v. Tryon*.

count, and satisfaction of and for the tithes of the loppings of antient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed gross wood; this is explained to mean such trees as are (j) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (k) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber-trees as I have just described, being of the age of twenty years or above, and, thereupon being privileged by the statute, no tithes are payable either of the bodies, (l) bark, lops, or tops for whatever use (m) they are cut, with the exception of those instances in which a fraud is actually, or may probably be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (n) a man has a wood which is properly a copse wood, with a few timber-trees in it, of above twenty years growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promif-

(j) 3 Vin. lect. 28. Degge, p. 21. c. 4. 1. Inst. 53. a.

(k) Gwill. 829. pl. 470. Gwill. 133. Soby v. Molins. Degge, p. 11. c. 4. 241. & 2 Inst. 643. *contra*. but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom, see also a P. Wms. 606.

(l) Doct. & Stud. dial. 11. c. 55. 21. Co. 49. a.

(m) Though Bunb. 99. n. cites cases *contra*.

(n) Gwill. 837, 8, Lord Hardwicke cites 1 Cro. 347. Buckhurst v. Newton, n. *ibid*. If the case should be thought not fully to come up to all for which it is adduced, the doctrine may well rest upon his Lordship's own high authority, the report of the principal case in Gwill. being taken from a manuscript belonging to the family.

cuously together, so as it is almost impossible to distinguish, and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (o) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber-trees shall privilege the whole; but if the woods are mostly of fallows and different sorts of underwood, and here and there *sparfim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (p) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

Timber (q) trees of above twenty years growth, having once acquired exemption from tithes, retain it, though at the time of felling they are become dry and rotten, fit only for firebote or fuel, and not to be used for the purposes of timber, such being called *dotards*; and though of late they may have been lopped once in every seven years, as the bodies are privileged, so are the branches. In a case

(o) 2 Leon. 79. Daws v. Mollins. but see the case as cited in Buckhurst v. Newnton, 1 Cro. 347. and Gwill. 529. Turner v. Smith.

(p) Gibs. t. xxx. c. 3. 667. Ayl. par. j. can. [505, 6.] Degge, p. 11. c. 4. 3 Burn. eccl. l. 433.

But see 1 Sid. 300. Cornell v. Hawes. Gwill. 834.

(q) 1 Cro. 477. Ram v. Patenson. Gwill. 833. Mo. 908. Gwill. 542. Biggs v. Martin, contr. But see Gwill. 834. See also Witherington v. Harris. Gwill. 584.

not (r) long subsequent to that in which the above resolutions were pronounced, the court again held, that the boughs of timber trees above twenty years growth were not tithable, notwithstanding the decayed state of the parent tree: but that although of a tree being, once of twenty years growth and never having been lopped, and then after the twenty years being lopped, every ten or every seven years, tithes were not payable for the lops, yet if a timber-tree is lopped *before* it is of twenty years growth, (s) and afterwards it is lopped every ten or seven years, tithes shall be paid of such lops, because it had never acquired the privilege. These decisions had the ratification of Lord Hardwicke, C. in his judicial argument on the occasion above alluded to. But we find (t) him contradicting one part of the positions of Sir (u) Edward Coke, which on this, as on other subjects have in general had the sanction of subsequent determinations; namely, that tithes shall not be paid for the germins or branches which grow out of the *roots* of felled timber-trees of what age soever, for that the root is parcel of the inheritance. The contrary rule (v) his Lordship represents as having since prevailed, because great part of the copses, or underwood of the kingdom are germins from such stools of timber-trees, and the opposite doctrine would deprive the clergy of tithes of many underwoods. Then to the question, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees that have been only headed and

(r) Mo. 908. *Broke v. Rogers.*

(t) Gwill. 832.

Gwill. 833.

(u) 2 Inst. 643.

(s) But what if it ceases to be lopped for twenty years successively?

(v) Wood growing on stubs, or

It is said to become timber, and stems is tithable, Gwill. 529. *Tax-*
*privileged, 1 R. A. 640. Degge,**ner v. Smith.*p. 11. c. 4. *tamen quare.* See Gwill.

165.

lopped? he answers, that in the first case there is no tree remaining whence they may derive the privilege; in the other there is. As to the oaks in question, he admits, that if they were topped, and made pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. Therefore, this being a question of fact when he came to the decree, he offered the plaintiff an issue for a jury, to determine, namely, whether these trees were lopped before twenty years growth, or not. As to the demand for tithe of beech wood, it not being disputed, but that it was above twenty years growth; he said, that also then depended upon the question of fact whether beech be timber by the custom of the country; and his lordship thought the terms of this issue should be whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of Mickleham, of which the plaintiff was rector, are and have used to be deemed timber. This might be found according to the truth of the case, and confining it to the parish would prevent any difficulty in respect to the precise limits of the place: indeed to direct the enquiry through a wider district might be productive of contrariety, as well as uncertainty. A third issue not relative to this species of tithes was proposed to the plaintiff to elect whether he would try it or not, who having finally waived trying any of the issues, his whole bill was dismissed, but without costs. This judgment, and the arguments contained in it embrace the most material points in the law concerning the tithe of wood.

There is a short note of a (w) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

on this occasion: if lopped under that age, they were always deemed tithable. The same is the case of acorns from oaks of any growth. Ash and elm are upon the same footing as oaks, and so are such trees as are timber merely by the reputation, and custom of the country. Therefore (x) it has been decided, that billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards, without discriminating between oaks, and other timber-trees; and where the trees are clearly of a species to be denominated timber, the court has declared (a) they would presume the trees to be above twenty years growth, unless the plaintiff demanding tithes proves the contrary.

The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

(x) Gwill. 84. 1 Morden v. Knight.

(a) Bunb. 126. Gwill. 645. Lloyd v. Mackworth. 3 Burn. Eccl. L. 431. Says that in many places, where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree, and if it is 24 inches in circumference, it is deemed of 20 years growth, if under that measure, it is accounted underwood.

(y) 1 Rol. R. 355. Gwill. 358. n. Laphorne v. — see Bibye v. Muxley. Bunb. 192. Gwill. 657. n. (d) *ibid.*

(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

(a) 2 P. Wms. 606. Gwill. 357. Wright v. Powle, Hob. 219. Gwill. 358. n. Guffly v. Pindar 2 Rol. R. 83, as to cherry, ash, and beech trees, and it is added, that aspen trees serve for arrows, which are for the defence of the realm.

(b) Degge, p. 11. c. 4. 11 Gwill. 543. Goodall v. Perkins.

respect, that no custom or reputation as to them appears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

Although as we have seen the bark of timber-trees is not tithable, tithes (c) shall be paid of the mast, and acorns, because these are of annual increase. But (d) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition, for in order to become tithable, they must be gathered and sold, and then (e) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (f) decided that broom made into bavons, and that wood growing in hedge-rows, are tithable. This (g) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylva cadua* does not depend upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent, and Suffex. As to (h) fruit trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets

(c) Degge, p. 11. c. 4. 11 Co. 49. a.

(d) Lit. 40. Gwill. 428. Anon.

(e) Gwill. 1554. Knight v. Halsey.

(f) Gwill. 542. Bigge v. Martin.

(g) Gwill. 1508-9. 1511. Mantell v. Paine.

(h) 2 Inst. 651. Baxter v. Hopes, 2 Inst. 652. 1 R. A. 641. Wood Inst. 168.

and

and faggots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolle assigns as a reason, that it is not a new encrease. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the founder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both tithable. On the other hand, if a man have (i) a nursery ground, out of which he sells fruit, and other trees to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not tithable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolle who argued this case, in his report of it mentions ashes, which at twenty years growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (j) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are titheable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case

(i) W. Jones. 416. Gwill. 501. arg. to be full of bad law, Gwill. Gibbs v. Wyborne S. C. more fully 1214. Adams v. Waller. reported 3 Cto. 526. 1 R. A. 637. (j) Hard. 380. Gwill. 515. Grant pl. 6. but this pl. is said by counsel v. Hedding.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (*k*) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (*l*) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(*k*) See Gwill. 829, 830. Walton v. Tryon.

(*l*) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes

of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decime fiunt uberiores*, that is, I suppose, by which tithes of the predial kind are encreased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (*m*) comprehends hop-poles and their barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (*n*) said to have been adjudged, that where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (*o*) if a man cuts down his copse-wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, and do not annually renew. It is true that the reason here assigned is not connected with the present topic, but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (*p*) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being

(*m*) 1 Freem. 334. Gwill. 562. "new, yet it is the husbandry is the asen. contra as to hop-poles, Gwill. 563. Gee v. Pearch, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bunb. 20 Gwill. 618. Bate v. Sprackling, acc. S. P. Deggs, p. 11. c. 4. ad. fin. who cites White v. Arch. S. P. adm. Gwill. 1506. 1508. in Mantel v. Paine, Gibf. 684. 2 Inst. 652. "Albeit the house be
 "new, yet it is the husbandry is the
 "main, &c." 2 Keb. 634. Watson
 v. Smith.
 (*n*) 1 Cro. 493. in East v. Harding.
 (*o*) 1 R. A. 637. Bedford v. Skinner.
 (*p*) Gwill 608. anon. under Smith v. Williams.

cut to clear the ground, and prepare it for the husbandry purposes of tillage and grazing, and the bill was dismissed.

II. For firewood (*q*) cut and consumed in a dwelling-house in the same parish, as it is generally asserted in many books, no tithes are due. This as to its origin is (*r*) ascribable to the same principle, being founded on the necessity of a habitation for carrying on the purposes of husbandry, on which tithes so much depend. Therefore, in a cause (*s*) where this defence was set up, the court declared, that as it appeared that the defendant had not any *house of husbandry* within the plaintiff's parish, but that the faggots in question were carried to the defendant's house, being out of the said parish, and there burnt, tithes were due to the plaintiff, for the same; and upon the like reasoning (*t*) it is laid down, whether authentically or not, that if a man hath a house of husbandry with lands, and demising the lands reserves the house, tithe of firewood is payable. It has (*u*) been made a question, whether this exemption of fuel is by the general law, or requiring the aid of a local custom to support it. Lord Hardwicke, C. (*v*) has given us his authoritative opinion, that wood cut to be burnt in the house of the parishioner within the parish, is exempt from tithe, not of common right, but by special custom only; and that it operates by way of customary exemption in respect of some satisfaction to the parson, which it is incumbent on the parishioners to shew. The encrease of tithes arising from husbandry to which a dwelling house is essential may be thought to afford the parson such requisite satisfaction; and his Lordship relies

(*q*) 1 R. A. 644. 656. Ellis v. Drake, and Aultin v. Lucas, *ibid*, and 1 Cro. 609. S. C. 2 Inst. 652. 8. Vin. Abr. 591. Gwill. 610. Roffe v. Harding, Mo. 683.

(*x*) Danv. Abr. t. Dimes 597. 1 Vent. 75.

(*y*) Gwill. 543. Goodall v. Perkins.

(*z*) Gibb. 686. Hutton and Croke Justices differ as to this matter, Hetl. 89. Norton v. Harmer.

(*u*) 1 Freem. 334. 5. Gwill. 562. anon.

(*v*) Gwill. 829. Walton v. Tryon.

on (*uu*) a case in which, according to the cited report of it, it seems adjudged that it is not *de jure per legem terræ* that any one is discharged of tithes for wood spent in his house, or for *fencing-stuff* for hedges. This case, however, on another (*w*) occasion having been cited at the bar was not thought decisive of the question, the court declining to come to any resolution upon the point, and stating that there were opinions both ways as to *fuel* where there was no custom; but they previously held that *hop-poles and wood for fences* were not tithable on general principles, and yet the other case seems to include them, as well as firewood. The truth is very numerous authorities, some of which are above cited, speak often indiscriminately of wood used for agricultural purposes, and for domestic fuel, as exempt from tithes, without any intimation that such exemptions depend on local particular usage, and on the contrary seem (*x*) to refer them to the common law of the land, and these exemptions coincide with other parts of the system of our tithe laws. It may be added, that although in a late (*y*)

(*uu*) 3 Cro. 113. Norton v. Farmer, Gwill. *ibid.* n. but see S. C. differently reported, and finally determined, because of the custom alleged, and the verdict against such allegations, and by Croke and Yelverton, there are divers precedents otherwise *without alleging a custom*, Hetl. 88. 110. 117. Per Croke the parson had a benefit, for he had better means of tithes, Hetl. 89. and Gibs. 686. speaks of a house of *busbandry*.

(*w*) 1 Freem. 334.

(*x*) 2 Inst. 652.

(*y*) Martell v. Paine, Gwill. 3506. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence

with Lord Hardwicke, that the exemption of fire-wood is only by special custom, Gwill. 965. and n. 960. and n. Erskine v. Ruffle. Both these great judges insist on the case in 3 Cro. 113. without adverting to the report of it in Hetley, which seems to make the other way, the C. B. quotes many other cases for and against his opinion, some of which I have not found, and some are not reported as to this matter. In Thomas v. the Duke of Beaufort, Gwill. 969. n. a custom for the exemption is stated in the answer, but does not appear to have been proved. Can the allegation or surmise avail without the proof? See 1 Keb. 634. Watson v. Smith.

case,

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Abbot v. Hicks, Nixon v. Browne. 1028. Ellis v. Fenner, 700. Bree v.

(a) 2 Keb. 534. Watfon v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill. 610. Rolfe 577. Cec v. Smith, Gibb. 666.

Tithe (*b*) of wood is a predial tithe : it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like ; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends ; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *when*

(*b*) Gwill. 830. Walton v. deemed good.

Tryon.

(*d*) Gwill. 581. Gee v. Peagh.

(*c*) Degge, p. ii. c. 4. ad fin.

See however Gwill. 1561. Knight v. Halley, and qu. whether a custom to set out wood standing by such measurement, would now be

(*e*) Gwill. 700. n. Brabourne

v. Eyres

(*f*) Gwill. 700. Bree v. Drew,

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(*g*) 3 Eccl. L. 460.

lopped? he answers, that in the first case there is no tree remaining whence they may derive the privilege; in the other there is. As to the oaks in question, he admits, that if they were topped, and made pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. Therefore, this being a question of fact when he came to the decree, he offered the plaintiff an issue for a jury, to determine, namely, whether these trees were lopped before twenty years growth, or not. As to the demand for tithe of beech wood, it not being disputed, but that it was above twenty years growth; he said, that also then depended upon the question of fact whether beech be timber by the custom of the country; and his lordship thought the terms of this issue should be whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of Mickleham, of which the plaintiff was rector, are and have used to be deemed timber. This might be found according to the truth of the case, and confining it to the parish would prevent any difficulty in respect to the precise limits of the place: indeed to direct the enquiry through a wider district might be productive of contrariety, as well as uncertainty. A third issue not relative to this species of tithes was proposed to the plaintiff to elect whether he would try it or not, who having finally waived trying any of the issues, his whole bill was dismissed, but without costs. This judgment, and the arguments contained in it embrace the most material points in the law concerning the tithe of wood.

There is a short note of a (w) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

on this occasion: if lopped under that age, they were always deemed tithable. The same is the case of acorns from oaks of any growth. Ash and elm are upon the same footing as oaks, and so are such trees as are timber merely by the reputation, and custom of the country. Therefore (x) it has been decided, that billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards, without discriminating between oaks, and other timber-trees; and where the trees are clearly of a species to be denominated timber, the court has declared (a) they would presume the trees to be above twenty years growth, unless the plaintiff demanding tithes proves the contrary.

The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

(x) Gwill. 84. 1 Morden v. Knight.

(a) Bunb. 126. Gwill. 645. Lloyd v. Mackworth. 3 Burn. Eccl. L. 431. Says that in many places, where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree, and if it is 24 inches in circumference, it is deemed of 20 years growth, if under that measure, it is accounted underwood.

(y) 1 Rol. R. 355. Gwill. 358. n. Laphorne v. — see Bibye v. Muxley. Bunb. 192. Gwill. 657. n. (d) *ibid.*

(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

(a) 2 P. Wms. 606. Gwill. 357. Wright v. Powle, Hob. 219. Gwill. 358. n. Guffy v. Pindar 2 Rol. R. 83, as to cherry, ash, and beech trees, and it is added, that aspen trees serve for arrows, which are for the defence of the realm.

(b) Degge, p. 11. c. 4. 11 Gwill. 543. Goodall v. Perkins.

respect, that no custom or reputation as to them appears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

Although as we have seen the bark of timber-trees is not tithable, tithes (*c*) shall be paid of the mast, and acorns, because these are of annual increase. But (*d*) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition, for in order to become tithable, they must be gathered and sold, and then (*e*) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (*f*) decided that broom made into bavins, and that wood growing in hedge-rows, are tithable. This (*g*) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylva cadua* does not depend upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent, and Suffex. As to (*h*) fruit trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets

(*c*) Degge, p. 11. c. 4. 11 Co. 49. a.

(*g*) Gwill. 1508-9. 1511. Mantell v. Paine.

(*d*) Lit. 40. Gwill. 428. Anon.

(*h*) 2 Inst. 651. Baxter v. Hopes,

(*e*) Gwill. 1554. Knight v. Halley.

2 Inst. 652. 1 R. A. 641. Wood Inst. 168.

(*f*) Gwill. 542. Biggs v. Martin.

and faggots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolle assigns as a reason, that it is not a new encrease. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the sounder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both tithable. On the other hand, if a man have (i) a nursery ground, out of which he sells fruit, and other trees to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not tithable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolle who argued this case, in his report of it mentions ashes, which at twenty years growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (j) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are titheable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case

(i) W. Jones. 416. Gwill. 501. arg. to be full of bad law, Gwill. Gibbs v. Wybourne S. C. more fully 1214. Adams v. Waller. reported 3 Cro. 526. 1 R. A. 637. (j) Hard. 380. Gwill. 515. Grant pl. 6. but this pl. is said by counsel v. Hedding.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all fold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so fold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (*k*) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (*l*) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(*k*) See Gwill. 829, 830. Walton v. Tryon.

(*l*) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes

of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

gularly

gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decime fiunt uberiores*, that is, I suppose, by which tithes of the predial kind are increased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (m) comprehends hop-poles and their barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (n) said to have been adjudged, that where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (o) if a man cuts down his copse-wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, and do not annually renew. It is true that the reason here assigned is not connected with the present topic, but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (p) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being

(m) 1 Freem. 334. Gwill. 562. "new, yet it is the husbandry is the asen. contra as to hop-poles, Gwill. 563. Gee v. Pearch, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bunb. 20 Gwill. 618. Bate v. Spracking, acc. S. P. Deggs, p. 11. c. 4. ad. fin. who cites White v. Arch. S. P. adm. Gwill. 1506. 1508. in Mantel v. Paine, Gibf. 684. 2 Inst. 652. "Albeit the house be

"new, yet it is the husbandry is the main, &c." 2 Keb. 634. Watson v. Smith.

(n) 1 Cro. 497. in East v. Harding.

(o) 1 R. A. 637. Bedford v. Skinner.

(p) Gwill 608. anon. under Smith v. Williams.

cut to clear the ground, and prepare it for the husbandry purposes of tillage and grazing, and the bill was dismissed.

II. For firewood (*q*) cut and consumed in a dwelling-house in the same parish, as it is generally asserted in many books, no tithes are due. This as to its origin is (*r*) ascribable to the same principle, being founded on the necessity of a habitation for carrying on the purposes of husbandry, on which tithes so much depend. Therefore, in a cause (*s*) where this defence was set up, the court declared, that as it appeared that the defendant had not any *house of husbandry* within the plaintiff's parish, but that the faggots in question were carried to the defendant's house, being out of the said parish, and there burnt, tithes were due to the plaintiff, for the same; and upon the like reasoning (*t*) it is laid down, whether authentically or not, that if a man hath a house of husbandry with lands, and demising the lands reserves the house, tithe of firewood is payable. It has (*u*) been made a question, whether this exemption of fuel is by the general law, or requiring the aid of a local custom to support it. Lord Hardwicke, C. (*v*) has given us his authoritative opinion, that wood cut to be burnt in the house of the parishioner within the parish, is exempt from tithe, not of common right, but by special custom only; and that it operates by way of customary exemption in respect of some satisfaction to the parson, which it is incumbent on the parishioners to shew. The encrease of tithes arising from husbandry to which a dwelling house is essential may be thought to afford the parson such requisite satisfaction; and his Lordship relies

(*q*) 1 R. A. 644. 656. *Ellis v. Drake*, and *Austin v. Lucas*, *ibid*, and 1 Cro. 609. S. C. 2 Inst. 652. 8. Vin. Abr. 591. Gwill. 610. *Rosse v. Harding*, Mo. 683.

(*x*) *Danv. Abr. t. Dismes* 597. 1 Vent. 75.

(*y*) Gwill. 543. *Goodall v. Perkins*.

(*r*) Gibb. 686. *Hutton and Croke* Justices differ as to this matter, *Hetl. 89. Norton v. Harmer*.

(*u*) 1 Freem. 334. 5. Gwill. 562. *anon*.

(*v*) Gwill. 829. *Walton v. Tryon*.

on (u) a case in which, according to the cited report of it, it seems adjudged that it is not *de jure per legem terræ* that any one is discharged of tithes for wood spent in his house, or for *fencing-stuff for hedges*. This case, however, on another (w) occasion having been cited at the bar was not thought decisive of the question, the court declining to come to any resolution upon the point, and stating that there were opinions both ways as to *fuel* where there was no custom; but they previously held that *hop-poles and wood for fences* were not tithable on general principles, and yet the other case seems to include them, as well as firewood. The truth is very numerous authorities, some of which are above cited, speak often indiscriminately of wood used for agricultural purposes, and for domestic fuel, as exempt from tithes, without any intimation that such exemptions depend on local particular usage, and on the contrary seem (x) to refer them to the common law of the land, and these exemptions coincide with other parts of the system of our tithe laws. It may be added, that although in a late (y)

(u) 3 Cro. 113. Norton v. Farmer, Gwill. *ibid.* n. but see S. C. differently reported, and finally determined, because of the custom alleged, and the verdict against such allegations, and by Croke and Yelverton, there are divers precedents otherwise *without alledging a custom*, Hetl. 88. 110. 117. Per Croke the parson had a benefit, for he had better means of tithes, Hetl. 89. and Gibs. 636. speaks of a house of *butlery*.

(w) 1 Freem. 334.

(x) 2 Inst. 652.

(y) Maqell v. Paine, Gwill. 1506. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence

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cuously together, so as it is almost impossible to distinguish, and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (o) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber-trees shall privilege the whole; but if the woods are mostly of fallows and different sorts of underwood, and here and there *sparfim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (p) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

Timber (q) trees of above twenty years growth, having once acquired exemption from tithes, retain it, though at the time of felling they are become dry and rotten, fit only for firebote or fuel, and not to be used for the purposes of timber, such being called *dotards*; and though of late they may have been lopped once in every seven years, as the bodies are privileged, so are the branches. In a case

(o) 2 Leon. 79. Daws v. Mollins. but see the case as cited in Euckhurst v. Newnton, 1 Cro. 347. and Gwill. 529. Turner v. Smith.

(p) Gibs. t. xxx. c. 3. 667. Ayl. par. j. can. [505, 6.] Degge, p. 11. c. 4. 3 Burn. eccl. l. 433.

But see 1 Sid. 300. Cornell v. Haws. Gwill. 834.

(q) 1 Cro. 477. Ram v. Patenson. Gwill. 833. Mo. 908. Gwill. 542. Biggs v. Martin, contr. But see Gwill. 834. See also Witherington v. Harris. Gwill. 584.

not (r) long subsequent to that in which the above resolutions were pronounced, the court again held, that the boughs of timber trees above twenty years growth were not titihable, notwithstanding the decayed state of the parent tree: but that although of a tree being, once of twenty years growth and never having been lopped, and then after the twenty years being lopped, every ten or every seven years, tithes were not payable for the lops, yet if a timber-tree is lopped *before* it is of twenty years growth, (s) and afterwards it is lopped every ten or seven years, tithes shall be paid of such lops, because it had never acquired the privilege. These decisions had the ratification of Lord Hardwicke, C. in his judicial argument on the occasion above alluded to. But we find (t) him contradicting one part of the positions of Sir (u) Edward Coke, which on this, as on other subjects have in general had the sanction of subsequent determinations; namely, that tithes shall not be paid for the germins or branches which grow out of the *roots* of felled timber-trees of what age soever, for that the root is parcel of the inheritance. The contrary rule (v) his Lordship represents as having since prevailed, because great part of the copses, or underwood of the kingdom are germins from such stools of timber-trees, and the opposite doctrine would deprive the clergy of tithes of many underwoods. Then to the question, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees that have been only headed and

(r) Mo. 908. *Broke v. Rogers*.
Gwill. 833.

(s) Gwill. 832.

(t) But what if it ceases to be lopped for twenty years successively? It is said to become timber, and is privileged, 1 R. A. 640. *Degge*, p. 11. c. 4. *tamen quare*. See Gwill. 165.

(u) 2 Inst. 643.

(v) Wood growing on stubs, or stems is titihable, Gwill. 529. *Tucker v. Smith*.

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(b) Degge, p. 12. c. 4. 11 Gwill. 543. Goodall v. Perkins.

respect, that no custom or reputation as to them appears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

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(d) Lit. 40. Gwill. 428. Anon.

(e) Gwill. 1554. Knight v. Halsey.

(f) Gwill. 542. Biggs v. Martin.

(g) Gwill. 1508-9. 1511. Mantell v. Paine.

(h) 2 Inst. 651. Baxter v. Hopes, 2 Inst. 652. 1 R. A. 641. Wood Inst. 168.

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and faggots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolle assigns as a reason, that it is not a new encrease. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the founder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both tithable. On the other hand, if a man have (i) a nursery ground, out of which he sells fruit, and other trees to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not tithable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolle who argued this case, in his report of it mentions ashes, which at twenty years growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (j) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are titheable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case

(i) W. Jones. 416. Gwill. 501. arg. to be full of bad law, Gwill. Gibbs v. Wyborne S. C. more fully 1214. Adams v. Waller. reported 3 Cro. 526. 1 R. A. 637. (j) Hard. 380. Gwill. 515. Grant pl. 6. but this pl. is said by counsel v. Hedding.

of trees yielding fruit which pays tithes, and others yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (*k*) doctrine above alluded to, that the tithable quality of wood felled is not to be determined by the subsequent use and application of it, should perhaps be chiefly, if not altogether understood in this sense, that its tithable quality does not depend on the design of using it for repairs, or for fuel, which design may be fluctuating and uncertain; but as to these two more general purposes abstractedly considered, that the wood is tithable or not, according to its inherent nature before the felling of it. There is perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded on the above mentioned considerations, of agriculture and husbandry, the law is otherwise.

I. It (*l*) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re-

(*k*) See Gwill. 829, 830. Walton v. Tryon. of wood felled by him yearly at ten years growth, and used in amending his hedges, and upon his land, and

(*l*) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. But a defendant has in one instance been decreed to account for tithes otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith v. Williams.

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gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decime fiunt uberiores*, that is, I suppose, by which tithes of the predial kind are encreased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (*m*) comprehends hop-poles and their barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (*n*) said to have been adjudged, that where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (*o*) if a man cuts down his copse-wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, and do not annually renew. It is true that the reason here assigned is not connected with the present topic, but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (*p*) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being

(*m*) 1 Frem. 334. Gwill. 562. "new, yet it is the husbandry is the asen. contra as to hop-poles, Gwill. 563. Gee v. Pearch, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bumb. 20 Gwill. 618. Bate v. Sprackling, acc. S. P. Degg, p. 11. c. 4. ad. fin. who cites White v. Arch. S. P. adm. Gwill. 1506. 1508. in Mantel v. Paine, Gibf. 684. 2 Inst. 652. "Albeit the house be
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 (*n*) 1 Cro. 497. in East v. Harding.
 (*o*) 1 R. A. 637. Bedford v. Skinner.
 (*p*) Gwill 608. anon. under Smith v. Williams.

cut to clear the ground, and prepare it for the husbandry purposes of tillage and grazing, and the bill was dismissed.

II. For firewood (*q*) cut and consumed in a dwelling-house in the same parish, as it is generally asserted in many books, no tithes are due. This as to its origin is (*r*) ascribable to the same principle, being founded on the necessity of a habitation for carrying on the purposes of husbandry, on which tithes so much depend. Therefore, in a cause (*s*) where this defence was set up, the court declared, that as it appeared that the defendant had not any *house of husbandry* within the plaintiff's parish, but that the faggots in question were carried to the defendant's house, being out of the said parish, and there burnt, tithes were due to the plaintiff, for the same; and upon the like reasoning (*t*) it is laid down, whether authentically or not, that if a man hath a house of husbandry with lands, and demising the lands reserves the house, tithe of firewood is payable. It has (*u*) been made a question, whether this exemption of fuel is by the general law, or requiring the aid of a local custom to support it. Lord Hardwicke, C. (*v*) has given us his authoritative opinion, that wood cut to be burnt in the house of the parishioner within the parish, is exempt from tithe, not of common right, but by special custom only; and that it operates by way of customary exemption in respect of some satisfaction to the parson, which it is incumbent on the parishioners to shew. The encrease of tithes arising from husbandry to which a dwelling house is essential may be thought to afford the parson such requisite satisfaction; and his Lordship relies

(*q*) 1 R. A. 644. 656. *Ellis v. Drake*, and *Austin v. Lucas*, *ibid*, and 1 Cro. 609. S. C. 2 Inst. 652. 8. Vin. Abr. 591. Gwill. 610. *Rosse v. Harding*, Mo. 683.

(*x*) Danv. Abr. t. *Dismes* 597. 1 Vent. 75.

(*y*) Gwill. 543. *Goodall v. Perkins*.

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(*u*) 1 Freem. 334. 5. Gwill. 562. anon.

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on (u) a case in which, according to the cited report of it, it seems adjudged that it is not *de jure per legem terræ* that any one is discharged of tithes for wood spent in his house, or for *fencing-stuff for hedges*. This case, however, on another (w) occasion having been cited at the bar was not thought decisive of the question, the court declining to come to any resolution upon the point, and stating that there were opinions both ways as to *fuel* where there was no custom; but they previously held that *hop-poles and wood for fences* were not tithable on general principles, and yet the other case seems to include them, as well as firewood. The truth is very numerous authorities, some of which are above cited, speak often indiscriminately of wood used for agricultural purposes, and for domestic fuel, as exempt from tithes, without any intimation that such exemptions depend on local particular usage, and on the contrary seem (x) to refer them to the common law of the land, and these exemptions coincide with other parts of the system of our tithe laws. It may be added, that although in a late (y)

(u) 3 Cro. 113. Norton v. Farmer, Gwill. *ibid.* n. but see S. C. differently reported, and finally determined, because of the custom alleged, and the verdict against such allegations, and by Croke and Yelverton, there are divers precedents otherwise *without alledging a custom*, Hetl. 88. 110. 117. Per Croke the parson had a benefit, for he had better means of tithes, Hetl. 89. and Gibs. 686. speaks of a house of *bandry*.

(w) 1 Freem. 334.

(x) 2 Inst. 652.

(y) Magtall v. Paine, Gwill. 1506. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence

with Lord Hardwicke, that the exemption of fire-wood is only by special custom, Gwill. 965. and n. 960. and n. Erskine v. Ruffe. Both these great judges insist on the case in 3 Cro. 113. without adverting to the report of it in Hetley, which seems to make the other way, the C. B. quotes many other cases for and against his opinion, some of which I have not found, and some are not reported as to this matter. In Thomas v. the Duke of Beaufort, Gwill. 969. n. a custom for the exemption is stated in the answer, but does not appear to have been proved. Can the allegation or surmise avail without the proof? See 1 Keb. 634. Watson v. Smith.

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case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Abbot v. Hicks, 1028. Ellis v. Feamer, 700. Bree v. Nixon v. Browne.

(a) 2 Keb. 534. Watson v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill. 610. Roffe 577. Coc v. Smith, Gibb. 656.

Tithe (*b*) of wood is a predial tithe : it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like ; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends ; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *when*

(*b*) Gwill. 830. Walton v. deemed good.

Tryon.

(*d*) Gwill. 581. Gee v. Peck.

(*c*) Degge, p. ii. c. 4. ad fin.

See however Gwill. 1561. Knight v. Halley, and qu. whether a custom to set out wood standing by such measurement, would now be

(*e*) Gwill. 700. n. Brabourne v. Eyres

(*f*) Gwill. 700. Bree v. Drew, 701. Waterman v. Jones.

(*g*) 3 Eccl. L 460.

lopped? he answers, that in the first case there is no tree remaining whence they may derive the privilege; in the other there is. As to the oaks in question, he admits, that if they were topped, and made pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. Therefore, this being a question of fact when he came to the decree, he offered the plaintiff an issue for a jury, to determine, namely, whether these trees were lopped before twenty years growth, or not. As to the demand for tithe of beech wood, it not being disputed, but that it was above twenty years growth; he said, that also then depended upon the question of fact whether beech be timber by the custom of the country; and his lordship thought the terms of this issue should be whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of Mickleham, of which the plaintiff was rector, are and have used to be deemed timber. This might be found according to the truth of the case, and confining it to the parish would prevent any difficulty in respect to the precise limits of the place: indeed to direct the enquiry through a wider district might be productive of contrariety, as well as uncertainty. A third issue not relative to this species of tithes was proposed to the plaintiff to elect whether he would try it or not, who having finally waived trying any of the issues, his whole bill was dismissed, but without costs. This judgment, and the arguments contained in it embrace the most material points in the law concerning the tithe of wood.

There is a short note of a (w) case in an old reporter simply stating, that young oaks under twenty years growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy

(w) *Wray v. Clench*. Mo. 908.

on this occasion : if lopped under that age, they were always deemed tithable. The same is the case of acorns from oaks of any growth. Ash and elm are upon the same footing as oaks, and so are such trees as are timber merely by the reputation, and custom of the country. Therefore (x) it has been decided, that billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards, without discriminating between oaks, and other timber-trees ; and where the trees are clearly of a species to be denominated timber, the court has declared (a) they would presume the trees to be above twenty years growth, unless the plaintiff demanding tithes proves the contrary.

The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in which they grow, are (y) beeches. Birches (z) may by the same means be privileged from tithes. Many (a) other trees, namely, horsechestnuts, limes, aspen, and cherry trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees (b) as alders, hazels, hollies, and others, are of so mean account in this

(x) Gwill. 84. 1 Morden v. Knight.

(a) Bunb. 126. Gwill. 645. Lloyd v. Mackworth. 3 Burn. Eccl. L. 431. says that in many places, where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree, and if it is 24 inches in circumference, it is deemed of 20 years growth, if under that measure, it is accounted underwood.

(y) 1 Rol. R. 355. Gwill. 358. n. Laphorne v. — see Bibye v. Muxley. Bunb. 192. Gwill. 657. n. (d) *ibid.*

(z) Mo. 907. Foster v. Peacock, Mo. 8 2. 2 P. Wms. 606. 2 Inst. 643. *contra.*

(a) 2 P. Wms. 606. Gwill. 357. Wright v. Powle, Hob. 219. Gwill. 358. n. Cuffly v. Pindar 2 Rol. R. 83, as to cherry, ash, and beech trees, and it is added, that aspen trees serve for arrows, which are for the defence of the realm.

(b) Degge, p. 11. c. 4. 11 Gwill. 543. Goodall v. Perkins.

respect, that no custom or reputation as to them appears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

Although as we have seen the bark of timber-trees is not tithable, tithes (c) shall be paid of the mast, and acorns, because these are of annual increase. But (d) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition, for in order to become tithable, they must be gathered and fold, and then (e) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (f) decided that broom made into bavons, and that wood growing in hedge-rows, are tithable. This (g) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylva cadua* does not depend upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent, and Suffex. As to (h) fruit trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets

(c) Degge, p. 11. c. 4. 11 Co. 49. a.

(d) Lit. 40. Gwill. 428. Anon.

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(*x*) 2 Inst. 652.

(*y*). Martell v. Paine, Gwill. 1506. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence

with Lord Hardwicke, that the exemption of fire-wood is only by special custom, Gwill. 965. and n. 967. and n. Erskine v. Ruffle. Both these great judges insist on the case in 3 Cro. 113. without adverting to the report of it in Hetley, which seems to make the other way, the C. B. quotes many other cases for and against his opinion, some of which I have not found, and some are not reported as to this matter. In Thomas v. the Duke of Beaufort, Gwill. 969. n. a custom for the exemption is stated in the answer, but does not appear to have been proved. Can the allegation or surmise avail without the proof? See 1 Keb. 634. Watson v. Smith.

case,

case, the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

III. It (z) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes, and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before mentioned as to firewood. But (a) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish appears clearly tithable.

(z) 1 R. A. 645. pl. 8, 9, 10. v. Harding. 838. n. Atbot. v. Hicks, Nixon v. Browne. 1028. Ellis v. Feamer, 700. Bree v.

(a) 2 Keb. 134. Watfon v. Smith, Drew, 701. n. Waterman v. Jones, 8 Vin. Abr. 591. Gwill 610. Roffe 577. Cec v. Smith, Gibb. 666.

Tithe (*h*) of wood is a predial tithe : it must, therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*c*) or the manner of payment of tithe-wood must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like ; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*d*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*e*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends ; he (*f*) certainly is not bound, nor is it reasonable he should be bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood, standing or felled. The authorities there cited confirm what Dr. Burn advances (*g*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, *when*

(*b*) Gwill. 830. Walton v. deemed good.
Tryon.

(*d*) Gwill. 581. Gee v. Peagh.

(*c*) Degge, p. ii. c. 4. ad fin.

(*e*) Gwill. 700. n. Brabourne

See however Gwill. 1561. Knight

v. Eyres

v. Halley, and qu. whether a cus-

(*f*) Gwill. 700. Bree v. Drew,

tom to set out wood standing by

701. Waterman v. Jones.

such measurement, would now be

(*g*) 3 Eccl. L. 460.

the tithe becomes due, that is, at the time of felling. In a case, (b) therefore, where the court declared, that tithes in kind were due for wood converted into charcoal, and decreed accordingly against the defendant, who was the purchaser of log-trees, and loppings and toppings of other trees for that purpose, we may observe that he had confessed by his answer that he *felled* the wood so converted, by which it appears to have been purchased standing, though still it may seem strange, that he should pay the tithe of the value of the charcoal, if such be the meaning of the decree, instead of the wood unmanufactured*.

V. I proceed to an article of great importance to the tithe owner in parts, where the growth of it is cultivated, that of *hops*. They have already been taken notice of as falling under the class or division of small tithes; whether the plant be indigenous in this island, or not, the cultivation of it for use has been comparatively stiled modern, and in (i) many cases been judiciously observed to have been introduced within the time of legal memory, which is carried so far back as the reign of Richard the first. Hops, therefore, stand upon the same footing as other things of late introduction. In a (j) judicial argument of chief baron Comyns, they are ranked with hemp, saffron, and tobacco, and it is declared all such *new* things shall be *minuta decima*. Accordingly it has been in two (k) distinct cases decided, that a modus, or established custom of paying a definite pecuniary sum in lieu and satisfaction of the tithe of hops, *being a late thing*, is a void custom, and not

(b) Gwill. 577. Coe v. Smith.

• This is the same case, the correctness of which is in a note above impeached, in making the owner of cattle depastured, instead of the occupier of the agifted land, liable to agiftment tithe.

(i) Cited in Knight v. Halfey. Gwill. 1531—1565.

(j) Com. R. 638. Wallis v. Payne. Gwill. 1557.

(k) Sid. 443. Crouch v. Redden. Gwill. 563. Gee v. Pearch. Gwill. 1557.

warranted by law, and the court taking effective cognisance that hops were not of sufficient antiquity to be the specific subject of a modus. But (l) hops, as well as other articles of novel introduction, may be covered by a modus for all small tithes in general, which operates to discharge (m) the land where they grow.

Tithes of hops as being of the predial kind must be duly set out; the proper way of doing this was the subject of much debate in a (n) late cause respecting this species of tithe within the parish of Farnham in Surrey. That suit in the form of it was an action by the occupier of the land against the tithe-owner for neglecting to take away his tithes of hops, after they were duly set out according to the usage of the place. The question was, whether this usage, which was proved to have existed for a great length of time within the parish, of setting apart every tenth row, whenever the hops were planted in equal rows, and every tenth hill when they were planted in unequal rows, and in conformity to which the tithes in question were proved to have been set out, was or was not available to the occupier, as a valid and legal custom. Evidence was also adduced with some minuteness for the purpose of manifesting the practical expedience, if not necessity, of the custom insisted on. On the other hand, the answer in chancery of the plaintiff in the action was read, admitting his belief that the introduction, and first cultivation of hops in Farnham, and elsewhere in this kingdom, were with reference to what is termed legal time, modern, and within the time of memory; although the

(l) 1 Sid. 443. Gwill. 1557. (m) 2 Keb. 612. Crouch v. The authorities to this purpose Resden.
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presely to the point. Wats. c. 1531.
xliz. f. 448.

court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (o) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual encrease has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(o) *Gwill.* 1553, &c.

the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill. 1569, 1565.

who tried the cause, to the jury to find for the defendant; was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* for the most part plucked or gathered by the hand, appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (s) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be a great difference in the size, and that it would be

(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

actual fraud if the small turnips were assigned to the parson ; and they declared, that if the quantity were sufficiently large, as if the growth of a whole field, or a whole acre were gathered at one time, they ought to be set out in *heaps*, and the parson to have every tenth heap. As to potatoes, which in this respect bear a strong analogy to the last mentioned product, being generally sown in considerable quantities, it has been (r) determined where they were brought home to the defendant's house, and placed in a brewhouse, and there measured and the tithe set out, that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are removed ; whether such separation may be accomplished by measure, or weight is not stated ; but one or other of those methods seems a juster course of proceeding than leaving them on the ground, either in computed heaps, or in parcels, each potatoe being numerically counted, inasmuch as they differ in size like turnips.

Peas, and beans have been already spoken of on two former occasions, namely, under the division of tithes into great and small, and under the head of corn and grain, when they are cut and harvested in a ripened state. It may be collected by what has been laid down under the article of hops, that when peas and beans are severed from the stem, and plucked green by the hand for the food of man, a different mode of setting them out must be pursued ; and that in this instance they are immediately on such severance tithable by measure. It is, however, (u) only when peas are thus gathered to sell, or to feed hogs, that they are tithable at all. If the occupier gather

(r) Gwill. 1110. Bosworth v. Limbrick.

(u) 1 R. A. 647.

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (v) trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (w) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (x) wild and (y) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (z) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking.

It is here proper to mention that it was a great question in a (a) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(v) God. rep. Can. 408.

Chapman v. Barlow.

(w) Gwill. 581. Lister v.

(z) Heth. 100. Anon.

Foy.

(a) Gwill. 1204-1229. Adams

(x) Gwill. 530. Anon.

v. Waller.

(y) Bunb. 183. Gwill. 657.

being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
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from parish to parish before they are ultimately planted for use, it was submitted that they ought not to pay a full tenth of their whole value upon each removal. Then as to the objection that the facts urged as reasons against the liability to payment of tithes were not equally in evidence, it was answered, that supposing the court could not take judicial notice of what all mankind know, which was a position not to be admitted and in many instances untrue, yet private knowledge of a notorious usage might have induced the court appealed from, to have directed an enquiry by the proper officer into these particulars, the result of which would have given them judicial knowledge. Lastly, the decree ought at least to have directed the officer in taking the account, to have made fair allowances for the heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which if so taken must do apparent injustice to the appellants, wherefore the decree ought to be reversed, or at least varied. On the other side it was insisted, that the argument drawn from the expence, difficulty, and artificial mode of raising the productions, and from the nature of the soil, climate, and places in which they are raised, urged to shew that they are not tithable matters, or not tithable in kind, would equally serve to prove various other vegetable productions not tithable, or not tithable in kind, which have always been admitted to be so, and would tend to make the same productions reasonably deemed tithable in some parts of the kingdom which could not be so considered in other parts; and if exotics, as such were not tithable, few of the vegetable productions in this country being believed to be indigenous, the land would scarcely yield any tithable matters whatever; that if it was inconvenient that productions of this sort raised for sale should be adjudged tithable, or tithable in kind, which inconveniences in the present case the appellants have occasioned, the incumbent

bent having been always willing to accept a reasonable composition an acre, such inconveniences could be remedied only by an act of the legislature, and could not be removed by those who in their judicial characters and capacities were only to declare what the law is, at the time of pronouncing their judgment. And lastly, that it had been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries and sold out again without having made an encrease, are tithable in kind, and it is reasonable that they should be so considered. Such was the scope of the arguments submitted to the house of Lords in the cases of the appellants and respondent respectively, upon the question touching the more essential merits of the cause; but other points were in litigation. A composition in lieu of these tithes and payments under it, was proved to have subsisted; did it or not require notice to be given to effectuate its determination, inasmuch (b) as the occupiers had set up an adverse title, by insisting that the agreement or composition was binding during the incumbency, and had filed a cross bill to substantiate such agreement; thus, as it was argued, they disclaimed the relation analogous to that of landlord and tenant, on which the necessity of notice is founded. It appears, however, the house thought that notice was necessary under the circumstances of the case. The notices actually given by the incumbent, were dated the eighth of September to determine a composition, as from the Michaelmas-day following for the ensuing year, and the bill was brought for tithes in kind for that year. The house, therefore, propounded this question to the judges, whether a notice given upon the eighth of September is sufficient to determine a composition for tithes from year to year; such year commencing on the twenty-ninth of

(b) Gwill. 1217. 1220-1. Hume v. Wright.

September. All the judges present concurred in opinion that such a notice is by no means sufficient to determine such a contract, in consequence of which the decree of the court of exchequer was reversed. But the prior decision by that judicature, of the main point as to these exotic plants being essentially (c) liable to tithes, seems not to have been in any degree shaken by the event of the appeal; and that they are subject to such payment may, therefore, be thought supported by the authority of this adjudication as well as of superior reason, though perhaps it may be equitable that allowances should be made to the gardener in respect of the extensive and extraordinary modes of cultivation, unless he can be duly compensated by the prices set on the nine parts destined for sale. Indeed, I believe it is very usual, and several books refer to such an arrangement, from motives of mutual convenience and moderation, for incumbents and tithe-owners to agree with the occupiers of garden-ground for a stated composition by the acre, or the like. So a pecuniary consideration may be due by immemorial custom, which constitutes a modus. If (d) the custom is a parochial one, extending to gardens and orchards throughout the parish, then the enlargement of the ground so cultivated, or the plantation of a new orchard where such custom prevails, does not make tithe due in kind; but it is otherwise, if it is a special prescription for any particular garden, or orchard. Accordingly it has been (e) adjudged that such pecuniary payment can only be for *ancient* gardens and orchards, when they are specifically and individually sought to be thereby dis-

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Wats. c. xlix. f. 447.

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VII. *Honey and wax of bees* are the last articles which I shall here mention among this class of *predial* tithes, for they are so ranked and denominated by (g) Godolphin, (h) though they seem not to fall exactly within the definition. The (i) bees themselves are not tithable because they are *feræ naturæ*. But (j) the honey, and wax are *de jure* tithable in kind. And (k) the manner of tithing them is by the tenth measure of honey, and by the tenth weight of wax. It is reasonable to imagine, that before the importation and use of sugar, the increase of English honey was more attended to and studied than it is at present, and that consequently this article then formed a considerable object in the tithing system. Yet I have not found its price noticed in the (l) accounts of provisions in the early reigns. But if in this respect the ecclesiastical revenues have sustained defalcation, the many valuable vegetable productions of novel cultivation, unknown to former ages, may be estimated as forming a more than adequate recompence, without speaking of the

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| (g) Rep. Can. 389. | (h) God. Rep. Can. 389. |
| (b) C xlix. f. 448. | (l) Collected at the end of different reigns in Parl. Hist. vol. I. and II. |
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the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill. 1560, 1565.

who tried the cause, to the jury to find for the defendant; was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* for the most part plucked or gathered by the hand, appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (s) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be a great difference in the size, and that it would be

(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

APPENDIX.

No. I.

A CATALOGUE of MONASTERIES of the yearly Value of Two Hundred Pounds, or upwards, dissolved by the Statute of 31 Hen. Eighth, and by such Means capable of being discharged of Tithes. In which are the following Abbreviations: A. Abbey; P. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks, Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacks; Cist. Cistercians; N. Nuns; T. in the Time of; ab. about the Year. The Catalogue is extracted from Tanner's *Notitia Monastica*.

BEDFORDSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Elstow olim Helenestow, Elnstow, Or Alnc- stowe A. }	Ben.	T.W.Conqr.	284	12	11½
Dunstaple P. -	C. Aust.	T.H.I.	344	13	3½
Wardon A. -	Cist.	1135	389	16	6½
Chickland P. -	Gilb.	ab. 1150.	212	3	5½
Newenham P. -	C. Aust.	T.H.L.	293	5	11
Woburn A. -	Cist.	1145	391	18	7½

BERKS.

Abingdon A. -	Ben.	ab. 670	1876	10	9
Bulterham; or Bytham- Montague A. }	C. Aust.	13 E. III.	28		1
Reading A. -	Ben.	T.H.I.	1930		
	U 3				

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (v) trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (w) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (x) wild and (y) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (z) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking.

It is here proper to mention that it was a great question in a (a) cause debated between twenty and thirty years ago, sometimes denominated the Kenfington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(v) God. rep. Can. 408.

Chapman v. Barlow.

(w) Gwill. 581. Lister v.

(z) Heth. 100. Anon.

Foy.

(x) Gwill. 1204-1229. Adams

(*) Gwill. 530. Anon.

v. Waller.

(y) Bunb. 183. Gwill. 657.

being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
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from parish to parish before they are ultimately planted for use, it was submitted that they ought not to pay a full tenth of their whole value upon each removal. Then as to the objection that the facts urged as reasons against the liability to payment of tithes were not equally in evidence, it was answered, that supposing the court could not take judicial notice of what all mankind know, which was a position not to be admitted and in many instances untrue, yet private knowledge of a notorious usage might have induced the court appealed from, to have directed an enquiry by the proper officer into these particulars, the result of which would have given them judicial knowledge. Lastly, the decree ought at least to have directed the officer in taking the account, to have made fair allowances for the heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which if so taken must do apparent injustice to the appellants, wherefore the decree ought to be reversed, or at least varied. On the other side it was insisted, that the argument drawn from the expence, difficulty, and artificial mode of raising the productions, and from the nature of the soil, climate, and places in which they are raised, urged to shew that they are not tithable matters, or not tithable in kind, would equally serve to prove various other vegetable productions not tithable, or not tithable in kind, which have always been admitted to be so, and would tend to make the same productions reasonably deemed tithable in some parts of the kingdom which could not be so considered in other parts; and if exotics, as such were not tithable, few of the vegetable productions in this country being believed to be indigenous, the land would scarcely yield any tithable matters whatever; that if it was inconvenient that productions of this sort raised for sale should be adjudged tithable, or tithable in kind, which inconveniences in the present case the appellants have occasioned, the incumbent

bent having been always willing to accept a reasonable composition an acre, such inconveniences could be remedied only by an act of the legislature, and could not be removed by those who in their judicial characters and capacities were only to declare what the law is, at the time of pronouncing their judgment. And lastly, that it had been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries and sold out again without having made an encrease, are tithable in kind, and it is reasonable that they should be so considered. Such was the scope of the arguments submitted to the house of Lords in the cases of the appellants and respondent respectively, upon the question touching the more essential merits of the cause; but other points were in litigation. A composition in lieu of these tithes and payments under it, was proved to have subsisted; did it or not require notice to be given to effectuate its determination, inasmuch (b) as the occupiers had set up an adverse title, by insisting that the agreement or composition was binding during the incumbency, and had filed a cross bill to substantiate such agreement; thus, as it was argued, they disclaimed the relation analogous to that of landlord and tenant, on which the necessity of notice is founded. It appears, however, the house thought that notice was necessary under the circumstances of the case. The notices actually given by the incumbent, were dated the eighth of September to determine a composition, as from the Michaelmas-day following for the ensuing year, and the bill was brought for tithes in kind for that year. The house, therefore, propounded this question to the judges, whether a notice given upon the eighth of September is sufficient to determine a composition for tithes from year to year; such year commencing on the twenty-ninth of

(b) Gwill. 1217. 1220-1. *Hume v. Wright.*

September.

September. All the judges present concurred in opinion that such a notice is by no means sufficient to determine such a contract, in consequence of which the decree of the court of exchequer was reversed. But the prior decision by that judicature, of the main point as to these exotic plants being essentially (c) liable to tithes, seems not to have been in any degree shaken by the event of the appeal; and that they are subject to such payment may, therefore, be thought supported by the authority of this adjudication as well as of superior reason, though perhaps it may be equitable that allowances should be made to the gardener in respect of the extensive and extraordinary modes of cultivation, unless he can be duly compensated by the prices set on the nine parts destined for sale. Indeed, I believe it is very usual, and several books refer to such an arrangement, from motives of mutual convenience and moderation, for incumbents and tithe-owners to agree with the occupiers of garden-ground for a stated composition by the acre, or the like. So a pecuniary consideration may be due by immemorial custom, which constitutes a modus. If (d) the custom is a parochial one, extending to gardens and orchards throughout the parish, then the enlargement of the ground so cultivated, or the plantation of a new orchard where such custom prevails, does not make tithe due in kind; but it is otherwise, if it is a special prescription for any particular garden, or orchard. Accordingly it has been (e) adjudged that such pecuniary payment can only be for *ancient* gardens and orchards, when they are specifically and individually sought to be thereby dis-

(c) Neither the expensive, nor the very precarious cultivation of hops was ever deemed a reason against subjecting them to tithes.

Wats. c. xlix. f. 447.

(d) 3 Burn's eccl. l. 439.

(e) Bumb. 79. Perrot v. Markwick, cited in Franklyn v. The Master, &c. of St. Cross.

charged from tithes in kind. In like manner, (f) where it was insisted in answer to a demand of tithes of apples in kind, that they ought not to be so paid, for that a modus of fourpence for every hoghead of cyder had been for time beyond memory paid to the rector there, in lieu of all orchard-fruit growing within the parish, the court was of opinion that the pretended modus or discharge of orchard fruit not made into cyder was a void custom.

VII. *Honey and wax of bees* are the last articles which I shall here mention among this class of *predial* tithes, for they are so ranked and denominated by (g) Godolphin, (h) though they seem not to fall exactly within the definition. The (i) bees themselves are not tithable because they are *feræ naturæ*. But (j) the honey, and wax are *de jure* tithable in kind. And (k) the manner of tithing them is by the tenth measure of honey, and by the tenth weight of wax. It is reasonable to imagine, that before the importation and use of sugar, the encrease of English honey was more attended to and studied than it is at present, and that consequently this article then formed a considerable object in the tithing system. Yet I have not found its price noticed in the (l) accounts of provisions in the early reigns. But if in this respect the ecclesiastical revenues have sustained defalcation, the many valuable vegetable productions of novel cultivation, unknown to former ages, may be estimated as forming a more than adequate recompence, without speaking of the

(f) Gwill. 535. Edgerton v. 447. 3 Cro. 559. Gwill 501
Follett. Barfoot v. Norton. F. N. B. 118.

(g) Rep. Can. 389.

(h) God. Rep. Can. 389.

(i) C. xlix. f. 448.

(l) Collected at the end of dif-

(j) 1 R. A. 651. 3 Cro. 404. Gwill. 501. Marg.

ferent reigns in Parl. Hist. vol. I. and II.

(k) 1 R. A. 635. W. Jon.

court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (o) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual encrease has been judicially recognized, except that from the soil, and that from the parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked, and gathered on the spot to preserve its quality, and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that

(o) Gwill. 1553, &c.

the tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (p) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is intitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quality of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*, which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of setting them out. Now the usage here insisted on cannot be referred either to a *custom*, or to a *modus*, both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time, or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (q) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge,

(p) Gwill. 1554.

(q) Gwill, 1560, 1565.

who tried the cause, to the jury to find for the defendant, was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was after copious, and elaborate argument affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time, and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (r) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* for the most part plucked or gathered by the hand, appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (s) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be a great difference in the size, and that it would be

(r) 1 Freem. 334. Gwill. 562.
Anon.

(s) Gwill. 944. Beaumont
v. Shilcot.

actual fraud if the small turnips were assigned to the parson; and they declared, that if the quantity were sufficiently large, as if the growth of a whole field, or a whole acre were gathered at one time, they ought to be set out in *heaps*, and the parson to have every tenth heap. As to potatoes, which in this respect bear a strong analogy to the last mentioned product, being generally sown in considerable quantities, it has been (1) determined where they were brought home to the defendant's house, and placed in a brewhouse, and there measured and the tithe set out, that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are removed; whether such separation may be accomplished by measure, or weight is not stated; but one or other of those methods seems a juster course of proceeding than leaving them on the ground, either in computed heaps, or in parcels, each potatoe being numerically counted, inasmuch as they differ in size like turnips.

Peas, and beans have been already spoken of on two former occasions, namely, under the division of tithes into great and small, and under the head of corn and grain, when they are cut and harvested in a ripened state. It may be collected by what has been laid down under the article of hops, that when peas and beans are severed from the stem, and plucked green by the hand for the food of man, a different mode of setting them out must be pursued; and that in this instance they are immediately on such severance tithable by measure. It is, however, (2) only when peas are thus gathered to sell, or to feed hogs, that they are tithable at all. If the occupier gather

(1) Gwill. 1110. Bosworth v. Limbrick. (2) 1 R. A. 647.

them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local, or particular custom to effectuate the exemption.

Fruit (*v*), trees growing in gardens, and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (*w*) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (*x*) wild and (*y*) black cherries, though in the latter case it was insisted in opposition to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

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It is here proper to mention that it was a great question in a (*a*) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer

(*v*) God. rep. Can. 408.

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being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country, a climate and a compost must be prepared for them to keep them in a state of vegetation, they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labor of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection which is only attainable by the skilful management of artificial heat; and that they frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as to the latter, of a large prime cost and a high duty on the importation. From these facts it was inferred that if the payment of tithes for these and other exotics was to be added to the operose and expensive method of cultivation it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals
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from parish to parish before they are ultimately planted for use, it was submitted that they ought not to pay a full tenth of their whole value upon each removal. Then as to the objection that the facts urged as reasons against the liability to payment of tithes were not equally in evidence, it was answered, that supposing the court could not take judicial notice of what all mankind know, which was a position not to be admitted and in many instances untrue, yet private knowledge of a notorious usage might have induced the court appealed from, to have directed an enquiry by the proper officer into these particulars, the result of which would have given them judicial knowledge. Lastly, the decree ought at least to have directed the officer in taking the account, to have made fair allowances for the heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which if so taken must do apparent injustice to the appellants, wherefore the decree ought to be reversed, or at least varied. On the other side it was insisted, that the argument drawn from the expence, difficulty, and artificial mode of raising the productions, and from the nature of the soil, climate, and places in which they are raised, urged to shew that they are not tithable matters, or not tithable in kind, would equally serve to prove various other vegetable productions not tithable, or not tithable in kind, which have always been admitted to be so, and would tend to make the same productions reasonably deemed tithable in some parts of the kingdom which could not be so considered in other parts; and if exotics, as such were not tithable, few of the vegetable productions in this country being believed to be indigenous, the land would scarcely yield any tithable matters whatever; that if it was inconvenient that productions of this sort raised for sale should be adjudged tithable, or tithable in kind, which inconveniences in the present case the appellants have occasioned, the incumbent

bent having been always willing to accept a reasonable composition an acre, such inconveniences could be remedied only by an act of the legislature, and could not be removed by those who in their judicial characters and capacities were only to declare what the law is, at the time of pronouncing their judgment. And lastly, that it had been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries and sold out again without having made an encrease, are tithable in kind, and it is reasonable that they should be so considered. Such was the scope of the arguments submitted to the house of Lords in the cases of the appellants and respondent respectively, upon the question touching the more essential merits of the cause; but other points were in litigation. A composition in lieu of these tithes and payments under it, was proved to have subsisted; did it or not require notice to be given to effectuate its determination, inasmuch (b) as the occupiers had set up an adverse title, by insisting that the agreement or composition was binding during the incumbency, and had filed a cross bill to substantiate such agreement; thus, as it was argued, they disclaimed the relation analogous to that of landlord and tenant, on which the necessity of notice is founded. It appears, however, the house thought that notice was necessary under the circumstances of the case. The notices actually given by the incumbent, were dated the eighth of September to determine a composition, as from the Michaelmas-day following for the ensuing year, and the bill was brought for tithes in kind for that year. The house, therefore, propounded this question to the judges, whether a notice given upon the eighth of September is sufficient to determine a composition for tithes from year to year; such year commencing on the twenty-ninth of

(b) Gwill. 1217. 1220-1. *Hume v. Wright.*

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(c) Neither the expensive, nor the very precarious cultivation of hops was ever deemed a reason against subjecting them to tithes.

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VII. *Honey and wax of bees* are the last articles which I shall here mention among this class of *predial* tithes, for they are so ranked and denominated by (g) Godolphin, (h) though they seem not to fall exactly within the definition. The (i) bees themselves are not tithable because they are *fera natura*. But (j) the honey, and wax are *de jure* tithable in kind. And (k) the manner of tithing them is by the tenth measure of honey, and by the tenth weight of wax. It is reasonable to imagine, that before the importation and use of sugar, the encrease of English honey was more attended to and studied than it is at present, and that consequently this article then formed a considerable object in the tithing system. Yet I have not found its price noticed in the (l) accounts of provisions in the early reigns. But if in this respect the ecclesiastical revenues have sustained defalcation, the many valuable vegetable productions of novel cultivation, unknown to former ages, may be estimated as forming a more than adequate recompence, without speaking of the

- (f) Gwill. 535. Edgerton v. 447. 3 Cro. 559. Gwill 5011
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(g) Rep. Can. 389. (h) God. Rep. Can. 389.
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general improvements in agriculture, and the much larger proportion than in ancient times of land in tillage.

I proceed now to the consideration of tithable matters of the species called *mixt* tithes.

VIII. Of this kind is the important article of *milk*. The (*m*) canon of arch-bishop Winchelsey, relating to milk, runs thus: “*decima vero (n) lactis et casei de vaccis, et capris proveniens, ubi cubant et pascuntur, ibi solvatur, alioquin si cubant in una parochia et pascuntur in alia parochia decima inter rectores dividatur (o) omnino.*” Here Dr. Burn (*p*) expresses a doubt whether, as the law now stands, the cattle shall not pay tithes in kind, only where they are milked, and an agistment tithe in the other parish. Such double tithing, however, of milch-cattle seems at least not to be warranted by the authority which he subjoins, and which is the case of the parson of Swillington, and an inhabitant of the adjoining parish of Kippax before referred to, under the article of agistment: Such inhabitant had carried the milk of his cattle depastured in Swillington to his house in Kippax, and used it there. It was argued that if a man has arable land without a house, as was the case of the party here, who had no house at Swillington, he is intitled to be discharged of the tithes of the milk, which maintains the servants, who

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because that is the effect of labour, and is not due of itself, and therefore, it is a good discharge: on the other hand, to pay the tenth quart of milk is not good, for that is not what is due, milk according to our law not being tithable by measure; but the chief justice held that to pay the tenth quart of milk at the parsonage house, or at any other place is good. In like manner, (w) if the custom be to carry the tithes of milk, however, separated from the nine parts, to the parsonage house, or to the church porch, such custom must be observed by the parishioner. To (x) a bill filed in the exchequer insisting on such custom of carrying the tithe milk to the church porch for the use of the parson, the defendant by his answer stated, that he had set out every tenth meal of milk in clean pans or vessels, and that the plaintiff having neglected to carry it away in a reasonable time, he, the defendant, had thrown it upon the ground, and he denied the custom alledged, and prayed an issue to try it. It was proposed, on behalf of the plaintiff, to read depositions taken in a former cause between the same parties, which was objected to, but the objection was overruled, the same question being at issue in that cause. Several witnesses deposed in support of the custom, whereupon the chief baron declared, that it was not an invariable rule in questions of this nature to refer themselves to a jury; but only where the matter is doubtful, and then take that course in cases both of modes and customs. He then summed up the evidence for the plaintiff, which appears very satisfactory and convincing in proof of the custom. Another of the barons argued, that the parish having been

(w) Bunb. 73 *Dodson v. Oliver*. It appears, Gwill. 623, S. C. that the bill was filed among other things for tithes of milk; but what fell from the Court relative thereto is not mentioned in that report. Yet Bunbury's Report seems confirmed in another place. Gwill. 826. *Carthew v. Edwards*.
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for the most part under a composition, the production of many instances of the custom could not be expected; that there was a great difference between a bill for subtraction of tithes, and a bill to establish a custom; a farmer will not set out his tithe in a way that is burthensome to himself, without a custom. Accordingly, the plaintiff prevailed in obtaining a decree for an account of those tithes without the hazard, and inconvenience of referring the existence of the custom to a jury.

It may be recollected from what has been stated, that this species of mixt tithes is required to be set out by the common law, as it is enforced by the (y) statute of Edward VI. in regard to all tithes of the predial kind. The common law method then of tithing milk is thus laid down: (z) "That if there is no particular custom or usage, the parishioner is obliged *de jure* to pay every tenth meal; to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking-place in his own pails in a reasonable time; and if he does not fetch it away before the next milking-time, the parishioner may justify the pouring of the milk upon the ground, because he *then* has occasion for his own pails." And it was alledged to have been determined by the whole court, that the milk ought not to be carried either to the church porch, or to the parson's house, but that it ought to be fetched by the parson. On this last point, as on other branches of tithe law, much uncertainty and fluctuation of opinion have formerly prevailed among the judges of the superior courts. In (a) a cause where no custom was

(y) 2 and 3 E. VI. c. 13.
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(a) Gwill. 527. Dodd v. Ingleton. The bill stated that the defendant under the colour of *some words*

was insisted on by either side, although slightly mentioned in the bill, the barons of the exchequer being divided in opinion upon the question, after long deliberation, and much argument by civilians and common lawyers, finally decreed, that the defendant for the future should bring, or send his tithe milk to the church porch, to the end that the plaintiff, or his agent, or servant might receive the same without cost. Several years after this solemn decision, we find (b) the judges of the common pleas declaring that of common right tithe of milk is payable at the parsonage, or vicarage house. Yet notwithstanding these authorities, the law seems now clearly settled otherwise. To this effect is a case (c) of later date than the two cases just cited, where the answer stated, that the plaintiff, the rector, having declared he would not send for, or fetch the tithe milk, the defendant ordered every tenth meal of his cows to be turned upon the ground, it not being usual or customary for the parishioners of that parish to carry their tithe-milk home to the rector, and the court, on the authority (d) of a determination above referred to, declared that the defendant ought to have milked the tenth meal of his cows in vessels of his own at the place, and in the manner he milked the other nine meals; and that the plaintiff ought to have fetched it away in his own vessels. And in

words in a decretal order in a former cause between himself as plaintiff, and other persons inhabitants of the same parish defendants the now defendant had not sent, or carried the same every tenth day or meal, as he ought to have done, according to the custom of the parish. These words were "that the defendant shall pay to the plaintiff tithe milk in kind all the year round, the said plaintiff or his tithe gatherer making a demand of the same at the respective habitations of the said defendants."

(b) 1 Lord Raym. 129. Scoles v. Lowther.

(c) Gwill. 826. Carthew v. Edwards.

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a judicial argument on a still more recent occasion, the chief baron cites, and seems to give his sanction to a prior adjudication, (e) according to which it was holden, that of common right, and without a custom, the vicar ought to fetch the tithe milk.

This mode of determining the tithe of milk, namely, by the tenth meal, appears to be established by a series of authorities, in (f) one of which it is added, that "in all cases where you do not make out some custom, you must pay according to the canon." And the meaning (g) has been in a decretal order studiously explained to prevent possibility of doubt, in the following words; "The defendant's whole tenth meal's milk every tenth morning, and his whole tenth meal's milk every *tenth evening*." Yet the same subject afterwards underwent much discussion in (h) a cause comprising various matters; but in which the manner of tithing milk was considered as the principal, and most interesting question. The defendants, the parishioners, professed to have duly set out to the plaintiff, the rector, for his tithe, *every fifth evening meal*, which they said was the tenth meal, to which the parson was entitled. The plaintiff, on the other hand, contended, that the tenth meal's milk properly included the two successive meals of the tenth day, and of that opinion was the

(e) *Bedle v. Miller*, cited in *fore*, he was decreed to account. *Erskine v. Ruffie*. Gwill. 969, Gwill. 1114.

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(f) *Bunb. 20.* Gwill. 618. (g) Gwill. 529. in *Dod v. Ingleton*. See Gwill. 1112. 3, 4. 1118. T. Raym. 277. S. C.

Bate v. Sprakling. The defendant had set out the tenth of each meal which was clearly wrong, there- (h) Gwill. 1101.—1120. *Bosworth v. Limbrick*.

court of exchequer ; and after citing (i) numerous cases on the subject (j) accordingly declared the plaintiff entitled to the tenth morning's meal of milk, and the tenth evening's meal of milk, and ordered the defendant to account for the same with costs. From this part of the decree there was an appeal to the house of lords, where among the printed reasons on the part of the appellants, it was urged, that the mode of tithing established by such decree in giving to the respondent the whole meal of every tenth morning, and every tenth evening was giving him, instead of the tenth meal, the nineteenth and twentieth meals, between which there was no more connection than between the first and twentieth, and that to deprive the farmers of the whole milk every tenth day, would subject them to great hardship, and inconvenience. Among the reasons, on the other side, the suggestion of inconvenience was sifted in detail, and such detriment shewn to be inconsiderable, though that ought not to outweigh the justice of the case ; that the tenth meal, and the tenth day have been, and ought to be considered as expressive of one and the same idea ; and the tenth of the morning's milkings and the tenth of the evenings milkings have conjunctly been considered as the tenth meal ; in confirmation of which proposition reliance was had on the expressions of the decretal order in another cause above quoted ; that the produce of an evening's milking, was on an average throughout the year, at least one-third less than that of a morning ; what therefore had been done by the appel-

(i) But not what is said respecting tithe-milk in *Scoles v. Lowther*, *Ld. Raym.* 129, nor this part of *Erskine v. Ruffle*. *Gwill.* 961. if the cows had been begun to be milked in the evening, instead of the morning, then the tithe-milk would have been due in the evening, and in the morning of the succeeding day. *Gwill.* 1115.

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(x) Gwill. 1046. *Morgan v. Neville*.

for the most part under a composition, the production of many instances of the custom could not be expected; that there was a great difference between a bill for subtraction of tithes, and a bill to establish a custom; a farmer will not set out his tithe in a way that is burthenfome to himself, without a custom. Accordingly, the plaintiff prevailed in obtaining a decree for an account of those tithes without the hazard, and inconvenience of referring the existence of the custom to a jury.

It may be recollected from what has been stated, that this species of mixt tithes is required to be set out by the common law, as it is enforced by the (y) statute of Edward VI. in regard to all tithes of the predial kind. The common law method then of tithing milk is thus laid down: (z) "That if there is no particular custom or usage, the parishioner is obliged *de jure* to pay every tenth meal; to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking-place in his own pails in a reasonable time; and if he does not fetch it away before the next milking-time, the parishioner may justify the pouring of the milk upon the ground, because he then has occasion for his own pails." And it was alledged to have been determined by the whole court, that the milk ought not to be carried either to the church porch, or to the parson's house, but that it ought to be fetched by the parson. On this last point, as on other branches of tithe law, much uncertainty and fluctuation of opinion have formerly prevailed among the judges of the superior courts. In (a) a cause where no custom was

(y) 2 and 3 E. VI. c. 13.

(a) Gwill. 527. Dodd v. In-

(z) Bunb. 73. Dodson v. Oliver.

gleton. The bill stated that the defendant under the colour of some words

was insisted on by either side, although slightly mentioned in the bill, the barons of the exchequer being divided in opinion upon the question, after long deliberation, and much argument by civilians and common lawyers, finally decreed, that the defendant for the future should bring, or send his tithe milk to the church porch, to the end that the plaintiff, or his agent, or servant might receive the same without cost. Several years after this solemn decision, we find (b) the judges of the common pleas declaring that of common right tithe of milk is payable at the parsonage, or vicarage house. Yet notwithstanding these authorities, the law seems now clearly settled otherwise. To this effect is a case (c) of later date than the two cases just cited, where the answer stated, that the plaintiff, the rector, having declared he would not send for, or fetch the tithe milk, the defendant ordered every tenth meal of his cows to be turned upon the ground, it not being usual or customary for the parishioners of that parish to carry their tithe-milk home to the rector, and the court, on the authority (d) of a determination above referred to, declared that the defendant ought to have milked the tenth meal of his cows in vessels of his own at the place, and in the manner he milked the other nine meals; and that the plaintiff ought to have fetched it away in his own vessels. And in

words in a decretal order in a former cause between himself as plaintiff, and other persons inhabitants of the same parish defendants the now defendant had not sent, or carried the same every tenth day or meal, as he ought to have done, according to the custom of the parish. These words were "that the defendant shall pay to the plaintiff tithe milk in kind all the year round, the said plaintiff or his tithe gatherer making a demand of the same at the respective habitations of the said defendants."

(b) 1 Lord Raym. 129. Scoles v. Lowther.

(c) Gwill. 826. Carthew v. Edwards.

(d) Bunb. 73. Dodson v. Oliver.

from parish to parish before they are ultimately planted for use, it was submitted that they ought not to pay a full tenth of their whole value upon each removal. Then as to the objection that the facts urged as reasons against the liability to payment of tithes were not equally in evidence, it was answered, that supposing the court could not take judicial notice of what all mankind know, which was a position not to be admitted and in many instances untrue, yet private knowledge of a notorious usage might have induced the court appealed from, to have directed an enquiry by the proper officer into these particulars, the result of which would have given them judicial knowledge. Lastly, the decree ought at least to have directed the officer in taking the account, to have made fair allowances for the heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which if so taken must do apparent injustice to the appellants, wherefore the decree ought to be reversed, or at least varied. On the other side it was insisted, that the argument drawn from the expence, difficulty, and artificial mode of raising the productions, and from the nature of the soil, climate, and places in which they are raised, urged to shew that they are not tithable matters, or not tithable in kind, would equally serve to prove various other vegetable productions not tithable, or not tithable in kind, which have always been admitted to be so, and would tend to make the same productions reasonably deemed tithable in some parts of the kingdom which could not be so considered in other parts; and if exotics, as such were not tithable, few of the vegetable productions in this country being believed to be indigenous, the land would scarcely yield any tithable matters whatever; that if it was inconvenient that productions of this sort raised for sale should be adjudged tithable, or tithable in kind, which inconveniences in the present case the appellants have occasioned, the incumbent

bent having been always willing to accept a reasonable composition an acre, such inconveniences could be remedied only by an act of the legislature, and could not be removed by those who in their judicial characters and capacities were only to declare what the law is, at the time of pronouncing their judgment. And lastly, that it had been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries and sold out again without having made an encrease, are tithable in kind, and it is reasonable that they should be so considered. Such was the scope of the arguments submitted to the house of Lords in the cases of the appellants and respondent respectively, upon the question touching the more essential merits of the cause; but other points were in litigation. A composition in lieu of these tithes and payments under it, was proved to have subsisted; did it or not require notice to be given to effectuate its determination, inasmuch (b) as the occupiers had set up an adverse title, by insisting that the agreement or composition was binding during the incumbency, and had filed a cross bill to substantiate such agreement; thus, as it was argued, they disclaimed the relation analogous to that of landlord and tenant, on which the necessity of notice is founded. It appears, however, the house thought that notice was necessary under the circumstances of the case. The notices actually given by the incumbent, were dated the eighth of September to determine a composition, as from the Michaelmas-day following for the ensuing year, and the bill was brought for tithes in kind for that year. The house, therefore, propounded this question to the judges, whether a notice given upon the eighth of September is sufficient to determine a composition for tithes from year to year; such year commencing on the twenty-ninth of

(b) Gwill. 1217. 1220-1. *Hume v. Wright.*

September.

September. All the judges present concurred in opinion that such a notice is by no means sufficient to determine such a contract, in consequence of which the decree of the court of exchequer was reversed. But the prior decision by that judicature, of the main point as to these exotic plants being essentially (c) liable to tithes, seems not to have been in any degree shaken by the event of the appeal; and that they are subject to such payment may, therefore, be thought supported by the authority of this adjudication as well as of superior reason, though perhaps it may be equitable that allowances should be made to the gardener in respect of the extensive and extraordinary modes of cultivation, unless he can be duly compensated by the prices set on the nine parts destined for sale. Indeed, I believe it is very usual, and several books refer to such an arrangement, from motives of mutual convenience and moderation, for incumbents and tithe-owners to agree with the occupiers of garden-ground for a stated composition by the acre, or the like. So a pecuniary consideration may be due by immemorial custom, which constitutes a modus. If (d) the custom is a parochial one, extending to gardens and orchards throughout the parish, then the enlargement of the ground so cultivated, or the plantation of a new orchard where such custom prevails, does not make tithe due in kind; but it is otherwise, if it is a special prescription for any particular garden, or orchard. Accordingly it has been (e) adjudged that such pecuniary payment can only be for *ancient* gardens and orchards, when they are specifically and individually sought to be thereby dis-

(c) Neither the expensive, nor the very precarious cultivation of hops was ever deemed a reason against subjecting them to tithes.

Wats. c. xlix. f. 447.

(e) Bumb. 79. Perrot v. Markwick, cited in Franklyn v. The Master, &c. of St. Cross.

(d) 3 Burn's eccl. l. 439.

charged from tithes in kind. In like manner, (f) where it was insisted in answer to a demand of tithes of apples in kind, that they ought not to be so paid, for that a modus of fourpence for every hogsheaf of cyder had been for time beyond memory paid to the rector there, in lieu of all orchard-fruit growing within the parish, the court was of opinion that the pretended modus or discharge of orchard fruit not made into cyder was a void custom.

VII. *Honey and wax of bees* are the last articles which I shall here mention among this class of *predial* tithes, for they are so ranked and denominated by (g) Godolphin, (h) though they seem not to fall exactly within the definition. The (i) bees themselves are not tithable because they are *feræ naturæ*. But (j) the honey, and wax are *de jure* tithable in kind. And (k) the manner of tithing them is by the tenth measure of honey, and by the tenth weight of wax. It is reasonable to imagine, that before the importation and use of sugar, the increase of English honey was more attended to and studied than it is at present, and that consequently this article then formed a considerable object in the tithing system. Yet I have not found its price noticed in the (l) accounts of provisions in the early reigns. But if in this respect the ecclesiastical revenues have sustained defalcation, the many valuable vegetable productions of novel cultivation, unknown to former ages, may be estimated as forming a more than adequate recompence, without speaking of the

(f) Gwill. 535. Edgerton v. 447. 3 Cro. 559. Gwill 5011 Follett. Barfoot v. Norton. F. N. B. 118.

(g) Rep. Can. 389.

(h) God. Rep. Can. 389.

(b) C xlix. f. 448.

(l) Collected at the end of dis-

(i) 1 R. A. 651. 3 Cro.

ferent reigns in Parl. Hist. vol. I. and II.

404. Gwill. 501. Marg.

(j) 1 R. A. 635. W. Jon.

general improvements in agriculture, and the much larger proportion than in ancient times of land in tillage.

I proceed now to the consideration of tithable matters of the species called *mixt* tithes.

VIII. Of this kind is the important article of *milk*. The (m) canon of arch-bishop Winchelsey, relating to milk, runs thus: "*decima vero (n) lactis et casei de vaccis, et capris proveniens, ubi cubant et pascuntur, ibi solvatur, alioquin si cubant in una parochia et pascuntur in alia parochia decima inter rectores dividatur (o) omnino.*" Here Dr. Burn (p) expresses a doubt whether, as the law now stands, the cattle shall not pay tithes in kind, only where they are milked, and an agistment tithe in the other parish. Such double tithing, however, of milch-cattle seems at least not to be warranted by the authority which he subjoins, and which is the case of the parson of Swillington, and an inhabitant of the adjoining parish of Kippax before referred to, under the article of agistment: Such inhabitant had carried the milk of his cattle depastured in Swillington to his house in Kippax, and used it there. It was argued that if a man has arable land without a house, as was the case of the party here, who had no house at Swillington, he is intitled to be discharged of the tithes of the milk, which maintains the servants, who

(m) Lynd. 199.

(n) "Sive vaccarum sive ovium
" vel caprarum aliorumve anima-
" lium de quibus colligitur lac."

Lynd. 200. But it seems tithe of
ewe-milk is only due by custom, for
a prescription to be exempt from
payment of it is good. 1 R. A.
654. Gilest. xxx. c. 5. "This is

" but to insist upon the whole
" right against which the custom
" has not prevailed." 1 Lord
Raymond. 137.

(o) Non equaliter sed propor-
tionaliter, Lynd. 198, but any
such divisions.

(p) 3 Eccl. l. 450.

plough the land, as much as if he had had a house, in which the milk was spent; but the court answered, that the law was otherwise, for it is of the same nature with wood that is burnt in the house, which is exempt from tithes only so long as it is so consumed. Such also is the law in respect of milk, which is discharged of tithes only because it is used in the house; it was therefore resolved by the whole court, that the parson of Swillington should have tithes of the milk of the milch cattle depastured in his own parish; but of course he was not also entitled to an agistment tithe, nor could it be claimed by any body else, consequently this case if intended to elucidate the doubt above suggested has not that effect, nor have I met with any express adjudication as to the tithe of milk, where the cows have been kept in one parish and milked in another: But the following (q) decision reported as extracted from the decree-book of the court of exchequer, where the cattle are stated to be both kept and milked out of the demandant's parish, requires explanation: The vicar of *Stepney* sued among other things for the tithes of milk, declaring his readiness to have accepted a supposed modus of sixpence for each cow in lieu thereof: The defendant not only insisted on the modus, but further that for the cows he had kept on a farm called *Red Lion Farm*, being always milked in *Whitechapel*, he ought not to pay tithes, the farm house being in the parish of *Whitechapel*, and he having paid tithes for them to the rector of that parish; yet the court ordered the defendant to pay for the tithes of all his milch cows, as well those kept on *Red Lion Farm*, as those in the parish of *Stepney*, at the rate of sixpence a cow yearly, although the same had been milked in the parish of *Whitechapel*. The reasons of this judgment do not appear. If the modus were personal as to

(q) Gwill. 607. *Wright v. Elderton*.

all the parishes keeping cows any where, it would have included cows kept on a farm at any distance, as well as on a farm in the adjacent parish; or perhaps the difficulty may be solved by supposing that *Red Lion Farm* extended into both parishes.

Another (r) canon of the same archbishop has the following provisions: "*de lacte vero volumus, quod decima solvatur dum durat, videlicet de caseo tempore suo, et de lacte in autumnno, et hyeme: nisi parochiani velint pro talibus facere competentem redemptionem, et hoc ad valorem decimæ, et commodum ecclesiæ.*" Hereby, as Degge (s) remarks, the tithe of milk is to be paid in cheefe, whilst the parishioner makes cheefe, at other times in kind; but, continues he, this part of the canon is generally over-ruled by the custom of the place; for in many places they pay milk in kind all the year, in some only cheefe, and in some, neither milk nor cheefe, but a small rate instead of either; and the (t) custom in this as in all other tithing is to be observed notwithstanding the canon. He adds, (u) however, soon afterwards, alluding to the same provincial constitution, that where tithe milk is paid, there no tithe cheefe is due, and so *vice versa*. Yet a distinction has been taken between the two articles; for (v) it is laid down, that a prescription to pay the tenth cheefe made from May-day until the first of August, in recompence for all tithe milk for the whole year, is good,

(r) Lynd. 194.

(s) P. II. c. 6.

(t) But a custom, manifestly unreasonable, will in this, as in other instances be disallowed. 1 Lord Raymond, 358. Hill v. Vaux. Shortly mentioned Gwill 1113.

(u) Degge, p. II. c. 6, near the end.

(v) 1 Cro. 609. Anstyn v.

Lucas. Mo. 909. 1 R. A. 651.

S. C. A similar custom has been declared void, but the terms of it seem obscure, and no reason is given. Gwill. 580. Lister v. Foy.

because

because that is the effect of labour, and is not due of itself, and therefore, it is a good discharge: on the other hand, to pay the tenth quart of milk is not good, for that is not what is due, milk according to our law not being titbable by measure; but the chief justice held that to pay the tenth quart of milk at the parsonage house, or at any other place is good. In like manner, (w) if the custom be to carry the tithes of milk, however, separated from the nine parts, to the parsonage house, or to the church porch, such custom must be observed by the parishioner. To (*) a bill filed in the exchequer insisting on such custom of carrying the tithe milk to the church porch for the use of the parson, the defendant by his answer stated, that he had set out every tenth meal of milk in clean pans or vessels, and that the plaintiff having neglected to carry it away in a reasonable time, he, the defendant, had thrown it upon the ground, and he denied the custom alledged, and prayed an issue to try it. It was proposed, on behalf of the plaintiff, to read depositions taken in a former cause between the same parties, which was objected to, but the objection was overruled, the same question being at issue in that cause. Several witnesses deposed in support of the custom, whereupon the chief baron declared, that it was not an invariable rule in questions of this nature to refer themselves to a jury; but only where the matter is doubtful, and then take that course in cases both of moduses and customs. He then summed up the evidence for the plaintiff, which appears very satisfactory and convincing in proof of the custom. Another of the barons argued, that the parish having been

(w) Bunb. 73 *Dodson v. Oliver*. It appears, Gwill. 623, S. C. that the bill was filed among other things for tithes of milk; but what fell from the Court relative thereto is not mentioned in that report. Yet Bunbury's Report seems confirmed in another place. Gwill. 826. *Carthew v. Edwards*. (*) Gwill. 1046. *Morgan v. Neville*.

for the most part under a composition, the production of many instances of the custom could not be expected; that there was a great difference between a bill for subtraction of tithes, and a bill to establish a custom; a farmer will not set out his tithe in a way that is burthensome to himself, without a custom. Accordingly, the plaintiff prevailed in obtaining a decree for an account of those tithes without the hazard, and inconvenience of referring the existence of the custom to a jury.

It may be recollected from what has been stated, that this species of mixt tithes is required to be set out by the common law, as it is enforced by the (7) statute of Edward VI. in regard to all tithes of the predial kind. The common law method then of tithing milk is thus laid down: (2) "That if there is no particular custom or usage, the parishioner is obliged *de jure* to pay every tenth meal; to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking-place in his own pails in a reasonable time; and if he does not fetch it away before the next milking-time, the parishioner may justify the pouring of the milk upon the ground, because he then has occasion for his own pails." And it was alledged to have been determined by the whole court, that the milk ought not to be carried either to the church porch, or to the parson's house, but that it ought to be fetched by the parson. On this last point, as on other branches of tithe law, much uncertainty and fluctuation of opinion have formerly prevailed among the judges of the superior courts. In (a) a cause where no custom was

(7) 2 and 3 E. VI. c. 13.

(2) Bunb. 73. Dodson v. Oliver.

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was insisted on by either side, although slightly mentioned in the bill, the barons of the exchequer being divided in opinion upon the question, after long deliberation, and much argument by civilians and common lawyers, finally decreed, that the defendant for the future should bring, or send his tithe milk to the church porch, to the end that the plaintiff, or his agent, or servant might receive the same without cost. Several years after this solemn decision, we find (b) the judges of the common pleas declaring that of common right tithe of milk is payable at the parsonage, or vicarage house. Yet notwithstanding these authorities, the law seems now clearly settled otherwise. To this effect is a case (c) of later date than the two cases just cited, where the answer stated, that the plaintiff, the rector, having declared he would not send for, or fetch the tithe milk, the defendant ordered every tenth meal of his cows to be turned upon the ground, it not being usual or customary for the parishioners of that parish to carry their tithe-milk home to the rector, and the court, on the authority (d) of a determination above referred to, declared that the defendant ought to have milked the tenth meal of his cows in vessels of his own at the place, and in the manner he milked the other nine meals; and that the plaintiff ought to have fetched it away in his own vessels. And in

words in a decretal order in a former cause between himself as plaintiff, and other persons inhabitants of the same parish defendants the now defendant had not sent, or carried the same every tenth day or meal, as he ought to have done, according to the custom of the parish. These words were "that the defendant shall pay to the plaintiff tithe milk in kind all the

"year round, the said plaintiff or his tithe gatherer making a demand of the same at the respective habitations of the said defendants."

(b) 1 Lord Raym. 129. Scoles v. Lowther.

(c) Gwill. 826. Carthew v. Edwards.

(d) Bunb. 73. Dodson v. Oliver.

a judicial argument on a still more recent occasion, the chief baron cites, and seems to give his sanction to a prior adjudication, (*e*) according to which it was holden, that of common right, and without a custom, the vicar ought to fetch the tithe milk.

This mode of determining the tithe of milk, namely, by the tenth meal, appears to be established by a series of authorities, in (*f*) one of which it is added, that “in all cases where you do not make out some custom, you must pay according to the canon.” And the meaning (*g*) has been in a decretal order studiously explained to prevent possibility of doubt, in the following words; “The defendant’s whole tenth meal’s milk every tenth morning, and his whole tenth meal’s milk every *tenth* evening.” Yet the same subject afterwards underwent much discussion in (*h*) a cause comprising various matters; but in which the manner of tithing milk was considered as the principal, and most interesting question. The defendants, the parsonage, professed to have duly set out to the plaintiff, the rector, for his tithe, *every fifth evening meal*, which they said was the tenth meal, to which the parson was entitled. The plaintiff, on the other hand, contended, that the tenth meal’s milk properly included the two successive meals of the tenth day, and of that opinion was the

(*e*) *Bedle v. Miller*, cited in *fore*, he was decreed to account. *Erskine v. Ruffle*. Gwill. 969, Gwill. 1114.

970.

(*g*) Gwill. 529. in *Dod v. In-*

(*f*) *Bunb. 20.* Gwill. 618. *gleton*. See Gwill. 1112. 3, 4. 1118. T. Raym. 277. S. C.

Bate v. Sprakling. The defendant had set out the tenth of each meal which was clearly wrong, there- (*h*) Gwill. 1101.—1120. *Bof-*
worth v. Limbrick.

court of exchequer; and after citing (i) numerous cases on the subject (j) accordingly declared the plaintiff entitled to the tenth morning's meal of milk, and the tenth evening's meal of milk, and ordered the defendant to account for the same with costs. From this part of the decree there was an appeal to the house of lords, where among the printed reasons on the part of the appellants, it was urged, that the mode of tithing established by such decree in giving to the respondent the whole meal of every tenth morning, and every tenth evening was giving him, instead of the tenth meal, the nineteenth and twentieth meals, between which there was no more connection than between the first and twentieth, and that to deprive the farmers of the whole milk every tenth day, would subject them to great hardship, and inconvenience. Among the reasons, on the other side, the suggestion of inconvenience was sifted in detail, and such detriment shewn to be inconsiderable, though that ought not to outweigh the justice of the case; that the tenth meal, and the tenth day have been, and ought to be considered as expressive of one and the same idea; and the tenth of the morning's milkings and the tenth of the evenings milkings have conjunctly been considered as the tenth meal; in confirmation of which proposition reliance was had on the expressions of the decretal order in another cause above quoted; that the produce of an evening's milking, was on an average throughout the year, at least one-third less than that of a morning; what therefore had been done by the appel-

(i) But not what is said respecting tithe-milk in *Scoles v. Lowther*, *Ld. Raym.* 129, nor this part of *Erskine v. Ruffle*. *Gwill.* 961. if the cows had been begun to be milked in the evening, instead of the morning, then the tithe-milk would have been due in the evening, and in the morning of the succeeding day. *Gwill.* 1115.

(j) Premising, however, that it was by accident it happened to be the whole milk of the day, namely,

lants was no more than setting out (l) a part for the whole, which was void; as a prescription to pay less than a tenth is a void prescription. The case was argued at the bar of the house in the presence of several learned lords, who then filled, or had filled, the highest judicial stations, when, without any debate or division it was "ordered and adjudged that the appeal be dismissed, and the decree complained of affirmed," without taking any notice of the costs of the appeal. Thus the legal sense of the *tenth meal* of milk is finally ascertained, and established. But as it was (m) remarked on this occasion by the court appealed from, there exist scarcely any modes of taking tithes in kind wholly free from the probability of mutual inconvenience, which may suggest mutual accommodation, and lead to the settlement of a reasonable composition between the parson, and the farmer.

It is observable, that the printed reasons of the appellants and respondent concur in this respect, that when the tenth meal was originally declared to be the right of the parson, it was substituted in the room of the tenth quart, or the tenth dish, or the tenth part of each meal, which was before supposed to be the thing really due, and that such tenth meal was introduced in favour of the clergy, and to remedy the inconvenience, which they sustained in being obliged to send for, and take away the produce of so numerous tithings. And yet, notwithstanding this coincidence of opinion in those who penned these statements in other respects adverse, in a (n) judicial argument, which I have more than once referred to, the doctrine, that tithe of milk is due the tenth day is traced back to the (o) Anglo-Saxon laws, and

(l) Bunb. 307. Gwill. 711.
Brincklow v Edmunds.

(m) Gwill. 1114.

(n) Gwill. 969. in *Erfkine v. Ruffie*.

(o) "*Et qui caseum fecerit, det Deo decimum, si vero non fecerit, lac decimo die.*" Ap. LL. Edw. Conf. quas Guil. Bastard confirm. Wilk. LL. Anglo Sax. 198.

it is added, that the tenth meal of milk is due of common right, and that this certainly is the most equal rule of tithing milk, though at some times the parson will have the advantage, and at other times the parishioner. How then is it the most equal rule? Tithing it by measure is subject to no occasional disparities, and perhaps the (p) alleged inconvenience of that mode is magnified in supposition beyond the reality, otherwise it would hardly have been established, and continued as the (q) incontestible law throughout the long civilized realm of ancient France. But with us, undoubtedly, the tenth meal, as above interpreted, is the settled criterion of the tithe of milk.

IX. Another tithable matter belonging to the class of mixt tithes is the article of *wool*; this subject hath been before touched on under the head of agistment.

Tithe (r) of wool is due of common right, at the time when it is clipped; but by prescription it may be set out the whole together at another time; and if the spiritual court will not allow such prescription, that jurif-

(p) The tenth meal is said to have been established by reason of the trouble, which would otherwise accrue in collecting so small parcels. 2 Danv. Abr. 596.

(q) And tithe-milk could not be made into cheese without the consent as it seems, tacit or express, of the parish priest entitled thereto.

"*De lacte idem videtur ut ex decem*

"*pintis una debeat, tamen si fiant*

"*de voluntate curati expressa vel ta-*

"*cita, casti decimus prestabitur curato*

"*quod est magis frequens. Et idem in*

"*butyro ut etiam decima debeat*"

&c. Rebuffi Trac. de Decimis,

Quæst. VI. § 33. These tracts

of Rebuffus are extremely scarce,

the copy I consulted belongs to

the Royal College of Physicians.

"*Pintis.*" I suppose, means Eng-

lish quarts. Du Lange, Gloss. v.

Pinta says "*Nostris Pinte*" which

is an English quart.

(r) Wats. c. L. 566. Mo.

910. 2 Cro. 702. Gwill. 215.

Green v. Hup.

dition shall be restrained by prohibition from proceeding in the cause. Tithes (*s*) are due for all fleece-wool; but locks of wool seem to be not tithable; indeed, in the case referred to, a custom was alledged to discharge the latter: A like prescription (*t*) to pay the tenth fleece in satisfaction of all locks and tithes of wool has been declared to be good in substance: And in another book, (*u*) it is said that such prescription ought to be of locks of wool casually lost. Yet it appears from other (*v*) authorities, as if locks of wool not being more than ordinary, and where no fraud is used, are exempted from tithes by the general rule of the common law, without the aid of any custom or prescription; and, (*w*) if the parishioners without fraud before shearing time, cut off the dirty locks called the birling of sheep, of this no tithe shall be paid; according to two cases, in one of which, however, it was surmised, as a consideration for the exemption, that the party claiming it wound up the tithe-fleeces for the parson. So if a (*x*) man shears his sheep round their necks about Michaelmas, to preserve them and their fleeces from brambles, and not for the benefit of the wool so clipped, but fairly and without covin, no tithe is due for such clippings, or neckings; though here too, according to (*y*) another report of what appears to be the same case, it was judged necessary to support the discharge by a suggestion, that the parishioners used to wind up the other fleeces at their own charge.

(*s*) Gwill. 579. Lister v. Foy. (*w*) 1 R. A. 646. Degge, p. ii. c. 6.

(*t*) 1 Cro. 363. Jofop v. Payne. (*x*) 1 R. A. 645. Degge. p. ii. c. 6.

(*u*) Mo. 911. Anon.

(*y*) Bul. 242, 3. Fols v.

(*v*) 2 Inst. 652. God. Rep. Parker, called in R. A. Joyse v.

Can. 462. Wood. Inst. l. Engl. Parker, B. R. M. 14. J. 1.

173.

If

If (z) sheep die of the rot, or other disease, or if the owner kills them for domestic consumption, or sale, still tithe is due; not indeed of the skins, not being of annual renewal; but for the wool of such sheep: though (a) if they die after being shorn, and before the Easter following, it is said the wool is not tithable, unless the parson can prescribe to have it.

Wool (b) of lambs is tithable, though tithe has been rendered of lambs in their wool two months only before, for it is a new increase. (c) And as Burn remarks, where a modus is paid for a tithe lamb, and the other nine lambs are shorn, tithes shall be paid of their wool, those of wool and lambs being different species of tithes, and consequently a modus for lambs being no satisfaction for the tithe of wool.

It is laid down by (d) Degge, who extracts the doctrine from (e) Lyndwood, that if the sheep of several proprietors depasture together in one flock, or under one shepherd, yet this shall be no reason for thier being tithed together, for every owner shall pay tithe of his individual sheep separately; but if the head of a family keeps his flock mixt with the sheep of his children, "*in potestate patris existentes, — tunc de talibus debet solvi decima tanquam de bonis ipsius patris.*" This latter case seems to be merely that of a father acting under the authority of natural guardian to his children.

(z) Degge, p. ii. c. 6. 1 R. A. Baker v. Sweet, 3 Burn. eccl. 646. See Latch. 254. Anon. l. 474. Gwill. 826. Carthew

(a) Wats. c. L. 567. F.N. B. v. Edwards. 118.

(c) Ibid.

(b) 1 R. A. 642. Wats. c. L. 566. Bunb. 90. Gwill. 629.

(d) P. ii. c. 6.
(e) Prov. 193,

Some (*f*) writers assert that the tithe of wool is to be paid to the tithe-owner proportionally for the time that the sheep are in the parish, as, that he shall have eight pounds of wool in eighty, of forty sheep, in the parish a whole year; four pounds of wool, if they were there only half the year, two pounds, if they were there only three months, and a tenth of a twelfth part of the wool, if they lay and fed a single month in the parish, for (*g*) no space of time less than thirty days successively, and not by intermission, is to be taken into the computation for this division of tithes between different rectors. But (*b*) Burn on the contrary states, that it is now clearly holden that the tithe both of wool, and lambs shall be paid where the sheep are shorn, and where the lambs fall, that is, provided they be removed thither without fraud, and there be no equitable claim to any part of the tithes of the parish from whence they came: That these tithes are in no wise to be divided, but the whole are to be paid where they lamb, or are shorn, and an agistment tithe for them in every parish where they have been depastured, as being there unprofitable cattle, yielding no other benefit to those tithe-owners; and that no regard is had to the distinction, whether they have or not continued for less than a month; for there is the same equity that tithes should be paid for one day as for thirty. But the same author admits, that if the removal of the sheep was unnecessary and only a little before shearing, or lambing time, this may amount to fraud, and if it appears in that light, tithes shall be paid in the parish, from which they were thus fraudulently removed. All those positions seem to be correct, though contrary to this writer's usual practice, no express authority is cited in their support. He subjoins,

(*f*) God. Rep. Can. 462. (*g*) Lynd. 198 Degge, p. ii.
Wats. c. L. 566. c. 6.

(*b*) 3 Eccl. l. 472.

however,

however, a case (i) relative to the question of fraud where the ewes were kept by the defendant in the parish of A. in which the demand lay, all the year until Christmas, when they were ready to drop their lambs, and then were removed to the defendant's own land in the parish of B. where there was a small modus only for lambs, and there kept till Lady-day for convenience of forage, as insisted on by the defendant, and at Lady-day were brought back to A. Two of the barons of the exchequer at first thought it might be proper to send it to an issue to try, whether the transaction was fraudulent or not, and whether this had been the defendant's usual course of husbandry; but afterwards they concurred in holding that there was not sufficient proof of fraud, and in dismissing the bill. This case does not amount to much, but it seems to imply as to lambs, first that they are *prima facie*, and regularly tithable where they are dropped; and secondly, that if the suggestion of fraud had been satisfactorily evinced, and the removal had not been plausibly accounted for, a right would have accrued contrary to the *prima facie* right, to the rector of the parish, from which such fraudulent removal was made; And moreover as to wool, notwithstanding the observation of the original reporter, that "the tithe of lambs must be paid where they fall, and is not a divisible thing as wool is," the tithe of the latter being due at the shearing of it, it may be better to adhere throughout to what Burn vouches for the modern doctrine on the subject, as tending to preserve systematical uniformity, and to avoid embarrassments.

On a former occasion, for the sake of the general prin-

(i) Bunb. 139. Gwill. 647. *Boys v. Ellis*.

for the most part under a composition, the production of many instances of the custom could not be expected ; that there was a great difference between a bill for subtraction of tithes, and a bill to establish a custom ; a farmer will not set out his tithe in a way that is burthensome to himself, without a custom. Accordingly, the plaintiff prevailed in obtaining a decree for an account of those tithes without the hazard, and inconvenience of referring the existence of the custom to a jury.

It may be recollected from what has been stated, that this species of mixt tithes is required to be set out by the common law, as it is enforced by the (y) statute of Edward VI. in regard to all tithes of the predial kind. The common law method then of tithing milk is thus laid down : (z) " That if there is no particular custom " or usage, the parishioner is obliged *de jure* to pay every " tenth meal ; to milk the cows at the usual place of " milking into his own pails, and the parson is obliged to " fetch it away from the milking-place in his own pails " in a reasonable time ; and if he does not fetch it away " before the next milking-time, the parishioner may " justify the pouring of the milk upon the ground, be- " cause he *then* has occasion for his own pails." And it was alledged to have been determined by the whole court, that the milk ought not to be carried either to the church porch, or to the parson's house, but that it ought to be fetched by the parson. On this last point, as on other branches of tithe law, much uncertainty and fluctuation of opinion have formerly prevailed among the judges of the superior courts. In (a) a cause where no custom was

(y) 2 and 3 E. VI. c. 13.

(z) Bunb. 73. Dodson v. Oliver.

(a) Gwill. 527. Dodd v. Ingleton. The bill stated that the defendant under the colour of *some words*

was insisted on by either side, although slightly mentioned in the bill, the barons of the exchequer being divided in opinion upon the question, after long deliberation, and much argument by civilians and common lawyers, finally decreed, that the defendant for the future should bring, or send his tithe milk to the church porch, to the end that the plaintiff, or his agent, or servant might receive the same without cost. Several years after this solemn decision, we find (b) the judges of the common pleas declaring that of common right tithe of milk is payable at the parsonage, or vicarage house. Yet notwithstanding these authorities, the law seems now clearly settled otherwise. To this effect is a case (c) of later date than the two cases just cited, where the answer stated, that the plaintiff, the rector, having declared he would not send for, or fetch the tithe milk, the defendant ordered every tenth meal of his cows to be turned upon the ground, it not being usual or customary for the parishioners of that parish to carry their tithe-milk home to the rector, and the court, on the authority (d) of a determination above referred to, declared that the defendant ought to have milked the tenth meal of his cows in vessels of his own at the place, and in the manner he milked the other nine meals; and that the plaintiff ought to have fetched it away in his own vessels. And in

words in a decretal order in a former cause between himself as plaintiff, and other persons inhabitants of the same parish defendants the now defendant had not sent, or carried the same every tenth day or meal, as he ought to have done, according to the custom of the parish. These words were "that the defendant shall pay to the plaintiff tithe milk in kind all the year round, the said plaintiff or his tithe gatherer making a demand of the same at the respective habitations of the said defendants."

(b) 1 Lord Raym. 129. Scoles v. Lowther.

(c) Gwill. 826. Carthew v. Edwards.

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a judicial argument on a still more recent occasion, the chief baron cites, and seems to give his sanction to a prior adjudication, (*e*) according to which it was holden, that of common right, and without a custom, the vicar ought to fetch the tithe milk.

This mode of determining the tithe of milk, namely, by the tenth meal, appears to be established by a series of authorities, in (*f*) one of which it is added, that "in all cases where you do not make out some custom, you must pay according to the canon." And the meaning (*g*) has been in a decretal order studiously explained to prevent possibility of doubt, in the following words; "The defendant's whole tenth meal's milk every tenth morning, and his whole tenth meal's milk every *tenth* evening." Yet the same subject afterwards underwent much discussion in (*b*) a cause comprising various matters; but in which the manner of tithing milk was considered as the principal, and most interesting question. The defendants, the parishioners, professed to have duly set out to the plaintiff, the rector, for his tithe, *every fifth evening meal*, which they said was the tenth meal, to which the parson was entitled. The plaintiff, on the other hand, contended, that the tenth meal's milk properly included the two successive meals of the tenth day, and of that opinion was the

(*e*) *Bedle v. Miller*, cited in *fore*, he was decreed to account. *Erskine v. Ruffle*. Gwill. 969, Gwill. 1114.

970.

(*f*) *Bunb. 20*. Gwill. 618. (*g*) Gwill. 529. in *Dod v. Ingleton*. See Gwill. 1112. 3, 4. 1118. *T. Raym. 277*. S. C.

Bate v. Sprakling. The defendant had set out the tenth of each meal which was clearly wrong, there- (*b*) Gwill. 1101.—1120. *Bosworth v. Limbrick*.

court

court of exchequer; and after citing (i) numerous cases on the subject (j) accordingly declared the plaintiff entitled to the tenth morning's meal of milk, and the tenth evening's meal of milk, and ordered the defendant to account for the same with costs. From this part of the decree there was an appeal to the house of lords, where among the printed reasons on the part of the appellants, it was urged, that the mode of tithing established by such decree in giving to the respondent the whole meal of every tenth morning, and every tenth evening was giving him, instead of the tenth meal, the nineteenth and twentieth meals, between which there was no more connection than between the first and twentieth, and that to deprive the farmers of the whole milk every tenth day, would subject them to great hardship, and inconvenience. Among the reasons, on the other side, the suggestion of inconvenience was sifted in detail, and such detriment shewn to be inconsiderable, though that ought not to outweigh the justice of the case; that the tenth meal, and the tenth day have been, and ought to be considered as expressive of one and the same idea; and the tenth of the morning's milkings and the tenth of the evenings milkings have conjunctly been considered as the tenth meal; in confirmation of which proposition reliance was had on the expressions of the decretal order in another cause above quoted; that the produce of an evening's milking, was on an average throughout the year, at least one-third less than that of a morning; what therefore had been done by the appel-

(i) But not what is said respecting tithe-milk in *Scoles v. Lowther*, *Ld. Raym.* 129, nor this part of *Erskine v. Ruffle*. *Gwill.* 961. if the cows had been begun to be milked in the evening, instead of the morning, then the tithe-milk would have been due in the evening, and in the morning of the succeeding day. *Gwill.* 1115.

(j) Premising, however, that it was by accident it happened to be the whole milk of the day, namely,

September. All the judges present concurred in opinion that such a notice is by no means sufficient to determine such a contract, in consequence of which the decree of the court of exchequer was reversed. But the prior decision by that judicature, of the main point as to these exotic plants being essentially (*c*) liable to tithes, seems not to have been in any degree shaken by the event of the appeal; and that they are subject to such payment may, therefore, be thought supported by the authority of this adjudication as well as of superior reason, though perhaps it may be equitable that allowances should be made to the gardener in respect of the extensive and extraordinary modes of cultivation, unless he can be duly compensated by the prices set on the nine parts destined for sale. Indeed, I believe it is very usual, and several books refer to such an arrangement, from motives of mutual convenience and moderation, for incumbents and tithe-owners to agree with the occupiers of garden-ground for a stated composition by the acre, or the like. So a pecuniary consideration may be due by immemorial custom, which constitutes a *modus*. If (*d*) the custom is a parochial one, extending to gardens and orchards throughout the parish, then the enlargement of the ground so cultivated, or the plantation of a new orchard where such custom prevails, does not make tithe due in kind; but it is otherwise, if it is a special prescription for any particular garden, or orchard. Accordingly it has been (*e*) adjudged that such pecuniary payment can only be for *ancient* gardens and orchards, when they are specifically and individually sought to be thereby dis-

(*c*) Neither the expensive, nor the very precarious cultivation of hops was ever deemed a reason against subjecting them to tithes. Wats. c. xlix. f. 447.
 (*e*) Bumb. 79. Perrot v. Markwick, cited in Franklyn v. The Master, &c. of St. Cross.

(*d*) 3 Burn's eccl. l. 439.

charged from tithes in kind. In like manner, (f) where it was insisted in answer to a demand of tithes of apples in kind, that they ought not to be so paid, for that a modus of fourpence for every hoghead of cyder had been for time beyond memory paid to the rector there, in lieu of all orchard-fruit growing within the parish, the court was of opinion that the pretended modus or discharge of orchard fruit not made into cyder was a void custom.

VII. *Honey and wax of bees* are the last articles which I shall here mention among this class of *predial* tithes, for they are so ranked and denominated by (g) Godolphin, (h) though they seem not to fall exactly within the definition. The (i) bees themselves are not tithable because they are *fera natura*. But (j) the honey, and wax are *de jure* tithable in kind. And (k) the manner of tithing them is by the tenth measure of honey, and by the tenth weight of wax. It is reasonable to imagine, that before the importation and use of sugar, the encrease of English honey was more attended to and studied than it is at present, and that consequently this article then formed a considerable object in the tithing system. Yet I have not found its price noticed in the (l) accounts of provisions in the early reigns. But if in this respect the ecclesiastical revenues have sustained defalcation, the many valuable vegetable productions of novel cultivation, unknown to former ages, may be estimated as forming a more than adequate recompence, without speaking of the

(f) Gwill. 535. Edgerton v. 447. 3 Cro. 559. Gwill 501
Follett. Barfoot v. Norton. F. N. B. 118.

(g) Rep. Can. 389.

(h) God. Rep. Can. 389.

(b) C xlix. f. 448.

(l) Collected at the end of dif-

(i) 1 R. A. 651. 3 Cro. 404. Gwill. 501. Marg.

ferent reigns in Parl. Hist. vol. I. and II.

(j) 1 R. A. 635. W. Jon.

general

general improvements in agriculture, and the much larger proportion than in ancient times of land in tillage.

I proceed now to the consideration of tithable matters of the species called *mixt* tithes.

VIII. Of this kind is the important article of *milk*. The (m) canon of arch-bishop Winchelsey, relating to milk, runs thus: "*decima vero (n) lactis et casei de vaccis, et capris proveniens, ubi cubant et pascuntur, ibi solvatur, alioquin si cubant in unâ parochiâ et pascuntur in aliâ parochiâ decima inter rectores dividatur (o) omnino.*" Here Dr. Burn (p) expresses a doubt whether, as the law now stands, the cattle shall not pay tithes in kind, only where they are milked, and an agistment tithe in the other parish. Such double tithing, however, of milch-cattle seems at least not to be warranted by the authority which he subjoins, and which is the case of the parson of Swillington, and an inhabitant of the adjoining parish of Kippax before referred to, under the article of agistment: Such inhabitant had carried the milk of his cattle depastured in Swillington to his house in Kippax, and used it there. It was argued that if a man has arable land without a house, as was the case of the party here, who had no house at Swillington, he is intitled to be discharged of the tithes of the milk, which maintains the servants, who

(m) Lynd. 199.

(n) "Sive vaccarum sive ovium vel caprarum aliorumve animalium de quibus colligitur lac." Lynd. 200. But 'it seems tithe of ewe milk is only due by custom, for a prescription to be exempt from payment of it is good. 1 R. A. 654. Gilest. xxx. c. 5. "This is

"but to insist upon the whole right against which the custom has not prevailed." 1 Lord Raymond. 137.

(o) Non equaliter sed proportionaliter, Lynd. 198, but any such divisions.

(p) 3 Eccl. l. 450.

plough the land, as much as if he had had a house, in which the milk was spent; but the court answered, that the law was otherwise, for it is of the same nature with wood that is burnt in the house, which is exempt from tithes only so long as it is so consumed. Such also is the law in respect of milk, which is discharged of tithes only because it is used in the house; it was therefore resolved by the whole court, that the parson of Swillington should have tithes of the milk of the milch cattle depastured in his own parish; but of course he was not also entitled to an agistment tithe, nor could it be claimed by any body else, consequently this case if intended to elucidate the doubt above suggested has not that effect, nor have I met with any express adjudication as to the tithe of milk, where the cows have been kept in one parish and milked in another: But the following (g) decision reported as extracted from the decree-book of the court of exchequer, where the cattle are stated to be both kept and milked out of the demandant's parish, requires explanation: The vicar of *Stepney* sued among other things for the tithes of milk, declaring his readiness to have accepted a supposed modus of sixpence for each cow in lieu thereof: The defendant not only insisted on the modus, but further that for the cows he had kept on a farm called *Red Lion Farm*, being always milked in *Whitechapel*, he ought not to pay tithes, the farm house being in the parish of *Whitechapel*, and he having paid tithes for them to the rector of that parish; yet the court ordered the defendant to pay for the tithes of all his milch cows, as well those kept on *Red Lion Farm*, as those in the parish of *Stepney*, at the rate of sixpence a cow yearly, although the same had been milked in the parish of *Whitechapel*. The reasons of this judgment do not appear. If the modus were personal as to

(g) Gwill. 607. *Wright v. Elderton*.

all the parishes keeping cows any where, it would have included cows kept on a farm at any distance, as well as on a farm in the adjacent parish; or perhaps the difficulty may be solved by supposing that *Red Lion Farm* extended into both parishes.

Another (r) canon of the same archbishop has the following provisions: "*de lacte vero volumus, quod decima solvatur dum durat, videlicet de caseo tempore suo, et de lacte in autumnis, et hyeme: nisi parochiani velint pro talibus facere competentem redemptionem, et hoc ad valorem decimæ, et commodum ecclesiæ.*" Hereby, as Degge (r) remarks, the tithe of milk is to be paid in cheese, whilst the parishioner makes cheese, at other times in kind; but, continues he, this part of the canon is generally over-ruled by the custom of the place; for in many places they pay milk in kind all the year, in some only cheese, and in some, neither milk nor cheese, but a small rate instead of either; and the (r) custom in this as in all other tithing is to be observed notwithstanding the canon. He adds, (u) however, soon afterwards, alluding to the same provincial constitution, that where tithe milk is paid, there no tithe cheese is due, and so *vice versa*. Yet a distinction has been taken between the two articles; for (v) it is laid down, that a prescription to pay the tenth cheese made from May-day until the first of August, in recompence for all tithe milk for the whole year, is good,

(r) Lynd. 194.

(s) P. II. c. 6.

(t) But a custom, manifestly unreasonable, will in this, as in other instances be disallowed. 1 Lord Raymond, 358. Hill v. Vaux. Shortly mentioned Gwill 1113.

(u) Degge, p. II. c. 6, near the end.

(v) 1 Cro. 609. Anstyn v.

Lucas. Mo. 909. 1 R. A. 651.

S. C. A similar custom has been declared void, but the terms of it seem obscure, and no reason is given. Gwill. 580. Lister v. Foy.

because

because that is the effect of labour, and is not due of itself, and therefore, it is a good discharge: on the other hand, to pay the tenth quart of milk is not good, for that is not what is due, milk according to our law not being tithable by measure; but the chief justice held that to pay the tenth quart of milk at the parsonage house, or at any other place is good. In like manner, (w) if the custom be to carry the tithes of milk, however, separated from the nine parts, to the parsonage house, or to the church porch, such custom must be observed by the parishioner. To (x) a bill filed in the exchequer insisting on such custom of carrying the tithe milk to the church porch for the use of the parson, the defendant by his answer stated, that he had set out every tenth meal of milk in clean pans or vessels, and that the plaintiff having neglected to carry it away in a reasonable time, he, the defendant, had thrown it upon the ground, and he denied the custom alledged, and prayed an issue to try it. It was proposed, on behalf of the plaintiff, to read depositions taken in a former cause between the same parties, which was objected to, but the objection was overruled, the same question being at issue in that cause. Several witnesses deposed in support of the custom, whereupon the chief baron declared, that it was not an invariable rule in questions of this nature to refer themselves to a jury; but only where the matter is doubtful, and then take that course in cases both of moduses and customs. He then summed up the evidence for the plaintiff, which appears very satisfactory and convincing in proof of the custom. Another of the barons argued, that the parish having been

(w) Bunb. 73 *Dodson v. Oliver*. It appears, Gwill. 623, S. C. that the bill was filed among other things for tithes of milk; but what fell from the Court relative thereto is not mentioned in that report. Yet Bunbury's Report seems confirmed in another place. Gwill. 826. *Carthew v. Edwards*.
(x) Gwill. 1046. *Morgan v. Neville*.

for the most part under a composition, the production of many instances of the custom could not be expected; that there was a great difference between a bill for subtraction of tithes, and a bill to establish a custom; a farmer will not set out his tithe in a way that is burthenfome to himself, without a custom. Accordingly, the plaintiff prevailed in obtaining a decree for an account of those tithes without the hazard, and inconvenience of referring the existence of the custom to a jury.

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This mode of determining the tithe of milk, namely, by the tenth meal, appears to be established by a series of authorities, in (f) one of which it is added, that "in all cases where you do not make out some custom, you must pay according to the canon." And the meaning (g) has been in a decretal order studiously explained to prevent possibility of doubt, in the following words; "The defendant's whole tenth meal's milk every tenth morning, and his whole tenth meal's milk every tenth evening." Yet the same subject afterwards underwent much discussion in (h) a cause comprising various matters; but in which the manner of tithing milk was considered as the principal, and most interesting question. The defendants, the parishioners, professed to have duly set out to the plaintiff, the rector, for his tithe, *every fifth evening meal*, which they said was the tenth meal, to which the parson was entitled. The plaintiff, on the other hand, contended, that the tenth meal's milk properly included the two successive meals of the tenth day, and of that opinion was the

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(g) Gwill. 529. in *Dod v. Ingleton*. See Gwill. 1112. 3, 4.

(f) *Bunb.* 20. Gwill. 618. *1118. T. Raym. 277. S. C.*

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court of exchequer; and after citing (i) numerous cases on the subject (j) accordingly declared the plaintiff entitled to the tenth morning's meal of milk, and the tenth evening's meal of milk, and ordered the defendant to account for the same with costs. From this part of the decree there was an appeal to the house of lords, where among the printed reasons on the part of the appellants, it was urged, that the mode of tithing established by such decree in giving to the respondent the whole meal of every tenth morning, and every tenth evening was giving him, instead of the tenth meal, the nineteenth and twentieth meals, between which there was no more connection than between the first and twentieth, and that to deprive the farmers of the whole milk every tenth day, would subject them to great hardship, and inconvenience. Among the reasons, on the other side, the suggestion of inconvenience was sifted in detail, and such detriment shewn to be inconsiderable, though that ought not to outweigh the justice of the case; that the tenth meal, and the tenth day have been, and ought to be considered as expressive of one and the same idea; and the tenth of the morning's milkings and the tenth of the evenings milkings have conjunctly been considered as the tenth meal; in confirmation of which proposition reliance was had on the expressions of the decretal order in another cause above quoted; that the produce of an evening's milking, was on an average throughout the year, at least one-third less than that of a morning; what therefore had been done by the appel-

(i) But not what is said respecting tithe-milk in *Scoles v. Lowther*, *Ld. Raym.* 129, nor this part of *Erskine v. Ruffle*. *Gwill.* 961. if the cows had been begun to be milked in the evening, instead of the morning, then the tithe-milk would have been due in the evening, and in the morning of the succeeding day. *Gwill.* 1115.

(j) Premising, however, that it was by accident it happened to be the whole milk of the day, namely,

those consumed in the parishioner's family, before it was clearly settled, that these animals were not generally tithable of common right. But in the next succeeding term it was agreed by the same court, that no tithes were due for rabbits by the general law, and only by the custom of the place. It is, therefore, necessary for the rector affirmatively to prove such custom insisted on in his favour. This then was (1) the third issue in a cause before spoken of resting on the rector to support, and which he declined trying, namely, whether by the custom of the parish tithes were due of rabbits; although the Lord Chancellor, in pronouncing his decree, thought, that the payment of a pecuniary composition, of which some proof was made, tended to shew that tithes were there due in kind, of this species of wild animals.

In another (2) statement of the same cause last cited, the plaintiff's counsel are represented as stating it to be a great question, whether this be a predial, mixt, or personal tithe, adding that customary tithes are generally deemed personal. But if it were requisite to add another epithet to the term "customary," perhaps it would proper to discriminate according to the nature of the subject matter, and, where tithes are due of things of the substance of the earth, to call them customary predial tithes; and where they are payable of other wild animals, as well as of fish, which are reduced into manual possession by some labour of the parishioner, to denominate these customary personal tithes.

(1) Gwill. 840. Walton v. Tryon. (2) 3 Burn, eccl. l. 453, 44

CHAPTER THE SIXTH.

Things not Tithable.

TITHES shall not be paid for hounds and the like, because, says (a) Degge, they are things only of pleasure. If we trace this doctrine to its source in the authority (b) cited by him, we find it indeed argued in the manner of the year-books, “ that dogs and cats are “ not tithable, for the spiritual law will not allow that “ vermin should be tithes, for apes and marmosets are “ but vermin, and if I grant to a man *omnia bona et Catalla*, dogs do not pass.” But the (c) court in the same cause considered hounds as kept not for pleasure simply, but for necessary uses, and held, which was the point in debate, that an action lay for taking them. It may then be proper somewhat to qualify the reason, why hounds are not tithable, by treating them as usually, and principally kept for pleasure, and amusement. This principle applies to collections of foreign birds, and beasts, in general kept as matters of entertainment, and curiosity, and operates to render them not tithable, independently of the wild nature of most of them.

Subject to the slight species of exception, perhaps, all the matters not tithable by the general law, and never made so in special instances by the allegation and proof of local custom, owe their exemption to one common principle; I mean the encouragement, and improvement of

(a) P. ii. c. 12.

(c) Ibid. 5. a.

(b) Yearb. 12. H. viii. 4. b.

husbandry.

husbandry. This is obviously the case of various articles incidentally and distinctly before spoken of, and of which it is not here intended to renew the discussion; for example, after-pasture agistment for beasts of the plough, and wood used for ploughbote, and the like, are exempt from the payment of tithes, in regard to all which particulars the farmer is exonerated by the common law, and no local usage, in derogation of it, has, I believe, ever been pretended.

Another article (*d*) falling within the same reasoning, and description, is that of headlands, sometimes called meres, balks, and butts in cornfields large enough only for turning the plough, for the hay growing on which no tithes are payable by the general law; such spaces being necessary in the course of husbandry, and being esteemed part of the ploughed land, of which the parson has the tithe. Though as to the statement (*e*) in one of our reporters, that this is the reason of the case in the (*f*) year-books, the subject before the court, was not a matter of tithes, (of which there is no mention,) but a custom for turning the plough on the adjacent headlands of another; such custom being alleged in justification of a supposed trespass in so doing.

But the most positive, and direct encouragement is given by the statute (*g*) of Edward the sixth, by which it is enacted, that all such barren heath, or waste ground not discharged from the tithes by act of parliament, which before that time had lain barren, and paid no tithes by

(*d*) 2 Inst. 652. 1 R. A. 646.
Lit. R. 13. Gwill. 427. Anon.
Bunb. 183. Gwill. 657. Chapman
v. Barlow,

(*e*) Lit. R. 3.

(*f*) Yearb. 22. E. iv. 8.

(*g*) 2 and 3. E. vi. c. 13. § 5

reason of the same barrenness, and then were or thereafter, should be improved and converted into arable or meadow ground, should from henceforth, after the end and term of seven years next after such improvement, pay tithe for the corn, and hay growing thereon. The section, immediately preceding had provided, that no person should be compelled to pay tithes for any lands discharged therefrom by the laws and statutes of the realm, or by any privilege, prescription, or composition real: so that (b) all former legal discharges are preserved. The section, immediately following that first above cited, enacts, that if any such barren, waste, or heath ground had before that time been charged with the payment of any tithes, and should be improved or converted into arable ground or meadow, that then the owners thereof should, during seven years next following from and after the improvement, pay such kind of tithe as was paid for the same before the said improvement; so that, as Degge (i) observes, it appears plainly by the proviso, to have been the intent of the legislature only to free the improved lands from the payment of such tithes as were produced by the improvement, which must be of hay, or corn, and no other.

The terms (k) used to denote the subject matters of this act of parliament, about ten years after the passing of it, were thus interpreted in the language of an old reporter, namely, “ 1. *barren* ground is understood by the opinion, and judgment of the common law to be that whereof no profit ariseth, or groweth; “ and ground, which hath been stubbed and grubbed,

(b) Degge, p. ii. c. 19.

(i) Ibid.

(k) Benb. 80. Gwill 131. n.

2 Inst. 656.

and

“ and after beareth either corn or grasse, is not
 “ barren: 2. *Waste* ground is understood such ground
 “ as no man doth challenge as his own, or no man can
 “ tell to whom it certainly appertaineth, and as lieth
 “ uninclosed, and unbounded with hedge or ditch; but
 “ the ground that lieth inclosed, and hedged and ditched
 “ in, and the land known is no waste ground: 3. *beath*
 “ ground is understood such ground as is dispersed, and
 “ lieth as common.” The distinction between the two
 last descriptions of land is not very obvious.

The statute in these provisions had a view to the encouragement of the farmer, and the extension of cultivation. Therefore, (1) though it contain no express words of discharge during the seven years, by a reasonable construction and intendment an exemption for that period is implied. This inference is indeed irresistible, when we connect the principal clause with that which declares, that such kind of tithes as was paid before the improvement should continue to be so immediately from the time of such improvement: Hence also it appears, that land (m) may be barren within the meaning of this statute, though it yield some fruit, and pay some tithe, as of wool, and lambs. But (n) land proper for agriculture, and not *in its nature* barren, shall immediately pay tithe after being converted into a state of tillage. This appears to be fully settled as the criterion; according to a (o) late determination, where land, formerly part of a common depastured by cattle and geese, being inclosed, drained, and converted into tillage without any manure,

(1) 2 Inst. 656. Degge, p. Saunderson.

ii. c. 19.

(n) 2 Inst. 656.

(m) 2 Inst. 655. See Dy. (o) Jones v. Le David. Gwill.
 170. 6. Gwill. 130. Pelles v. 1336.

produced at the first a valuable crop of oats : In that case the court, after the example of Lord Hardwicke C. on a (p) preceding occasion, seem to consider the question of the natural barrenness of the soil, as depending upon this other question, what was necessary to the first crop? It is then inferred, that if land will bear a crop of corn without expence in tillage, it must be decisive that this land is not in its nature barren. It was farther argued in giving judgment, that inclosure is essential in some situations to the enjoyment in severalty, without being essential to the fertility ; and that draining may be a great improvement, rendering land more productive, which would still have been productive without it : it was not, therefore, because a great expence had been incurred by inclosing and draining land without more, that such land should be protected by the statute. And the proprietor had a decree for an account of tithes after the suit had been pending seven years, but without costs.

In some (q) cases, however, where expences of an extraordinary kind are necessary to obtaining a first crop, as where a large bank was to be thrown down before the plough could go upon the lands in question ; or where, from the exposed situation of the ground, no corn could grow there without previously incurring the expence of stone-walls to protect it from the severity of the climate, the husbandman has had the benefit of the statute, these measures being deemed more essential to give fertility to the soil, even than manure.

(p) 1 Vez. 115. Gwill. 823. to *ibid.* 1338. reported *ibid.* 1197. in *Stockwell v. Terry.* where the circumstance of the

(q) *Byron v. Lamb*, cited *ibid.* 1338, reported *ibid.* 1594. appears the question of barrenness within the statute, went to a jury.

On the other hand, it is settled (*r*) by numerous authorities, that land, where wood grew, or which was full of thorns and bushes after it is stubbed, or grubbed, and made meadow, or arable, and sown with corn or grain, shall pay tithe immediately, without deriving any exemption from the statute. For such lands are not in their nature barren, but their being unproductive is attributable to negligence, and ill husbandry; but the case is otherwise, in respect of lands rendered fertile by foldage, and the various industrious means of agriculture, by which the soil is not simply meliorated, but essentially changed. Such was the scope of chief justice Popham's reasoning, with whom the other judges concurred, in the reign of Queen Elizabeth; and such has continued to be the received doctrine as to this point, amid the fluctuation of other tithe questions to the present time; for in the last of the cited cases we find Lord Hardwicke expressing himself to the same effect: "that
 " land, if in its own nature it is fit for tillage, but by
 " reason of wood, or other accidental circumstance, it
 " was not turned into tillage before, upon the taking
 " away of that accidental circumstance, it shall pay
 " tithes presently, on being turned to tillage; for
 " the act does not consider the expence, but that you
 " may, by possibility, be paid, as by the timber, under-
 " wood, &c. But if afterwards this land will not pro-
 " duce, unless dunged or chalked, the court has confi-
 " dered this as evidence of its being barren in its own
 " nature, and not proper for corn, without additional

(*r*) 1 Cro. 475. Gwill. 189. 159. Gwill. 649. Beardmore v. Sherington v. Fleetwood. 1 Freem. Gilbert. 1 Vez. 115. Gwill. 335. Gwill. 562. Anon. Gwill. 823. Stockwell v. Terry. 563. Gee v. Pearch. Bunb.

" improve-

“improvement.” The (s) same principle, that the expence of the undertaking is no equitable criterion for affording the protection of the statute to the land improved, seems to have prevailed in other cases, two preceding, and the third subsequent to this decision of Lord Hardwicke, that is, provided such expence is not incurred as a necessary means to surmount the sterility of the soil, but in the draining, fencing, or the like improvement of land not naturally barren.

But however uniform the sentiments of judges have been in respect to wood-lands grubbed up and improved, in regard to another description of ground, there appears to have been a difference of opinion, if we may trust the authorities; for according to (t) one case, *fens* or marshes, which are drained, are not liable to tithes during seven years; according to two other cases (u), they are liable to the immediate payment of them; and (v) if land be overflowed with water, and afterwards drained by industry, tithes will be payable immediately, although it had been overflowed from time immemorial. These contradictions are ascribed to the same year, and, as it seems, to the same court; but we need not hesitate in pronouncing, that if the fen or marsh is naturally of a productive quality, tithes are due immediately upon the draining and cultivation: This is confirmed by (w) a case in which it was contended, that

(s) Gwill. 714. Doyley v. Anon.

Hornby, 1 Rol. R. 354. 3 (v) 1 Cro. 475. Gwill. 189.

Bul. 165. Gwill. 1574. Buck Sherington v. Fleetwood.

v. Witt, Gwill. 1336. Jones v. (w) 1 Rol. R. 354. 3 Bull,
Le David. 165. Gwill. 1574. Buck v.

(t) Gwill. 130. n. Witt, Gwill. 825. in Stockwell

(u) Mo. 430. Gwill. 166. v. Terry.

M

land

land lately gained from the Severn sea, at the costs of the occupier, was not tithable within the time limited by the statute: The court, on the contrary, held this land, not being naturally barren, to be within the meaning of the statute. And it was stated, that if a man has a salt marsh, which has used to be overflowed by the sea, and he makes a fence against that element, and lays it down in meadow, tithes shall be paid of it, for the land is not of its own nature barren; barren land, according to the statute, being such as will not produce corn without extraordinary manure.

The (x) question, whether land is barren within the meaning and benefit of this act of parliament, has been determined to be triable at common law, and a prohibition was accordingly awarded to the spiritual court. But courts (y) of equity, on the facts appearing before them, of which facts they are judges as well as of the result in point of law, have repeatedly decided whether lands were barren, or not, in the sense of the statute, without the intervention of a jury, whose prejudices as (z) Degge on this occasion intimates, are by no means favourable to the rights of the church.

If (a) lands were barren heath, or waste ground, at the time of passing the act, and were improved, and enjoyed, or might have enjoyed the benefit of this law, and afterwards relapse into their pristine barrenness, the occupier

(x) 1 Keb. 253. Anon. vid, 1594. Byron v. Lamb.

(y) Gwill. 823. Stockwell v. (z) P. ii, c. 19.

Terry, 1336. Jones v. Le Da- (a) Ibid.

of such lands cannot claim the benefit of the statute upon a second improvement.

Lastly, it may be remarked, that (b) as one clause of the statute requires payment only of the tithes of corn and hay after the seven years; and as another clause provides only for the payment of such kind of tithe as was paid before the improvement, for the seven years next after the improvement, without expressly directing other tithes than those of corn and hay, to be paid after the seven years; a discharge might be inferred of all other tithes, except of corn and hay, after the expiration of the seven years. But to this it is answered, that there being several statutes enacted, and received canons in force for the due payment of tithes, and no negative words in the law of Edward the sixth, it shall not, by implication, abrogate those prior institutions to the prejudice of the church.

(b) Degge, p. ii. c. 19.

those consumed in the parishioner's family, before it was clearly settled, that these animals were not generally tithable of common right. But in the next succeeding term it was agreed by the same court, that no tithes were due for rabbits by the general law, and only by the custom of the place. It is, therefore, necessary for the rector affirmatively to prove such custom insisted on in his favour. This then was (1) the third issue in a cause before spoken of resting on the rector to support, and which he declined trying, namely, whether by the custom of the parish tithes were due of rabbits; although the Lord Chancellor, in pronouncing his decree, thought, that the payment of a pecuniary composition, of which some proof was made, tended to shew that tithes were there due in kind, of this species of wild animals.

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(1) Gwill. 840. Walton v. (2) 3 Burn, eccl. l. 453. 41 Tryon.

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(a) P. ii. c. 12.

(c) Ibid. 5. a.

(b) Yearb. 12. H. viii. 4. b.

husbandry.

of never having paid these tithes, and from such non-payment, he wished the Court to presume a grant or conveyance of these tithes from the lay impropriator: The Court declared it was clear, that against an ecclesiastical rector this defence could never be set up in any shape; whether a lay impropriator could have the same benefit was at first doubted; but that point seemed at rest, three successive decisions upon it having fully established, that there is no difference between a lay, and an ecclesiastical rector. Yet, notwithstanding these adjudications, (b) more recent authorities appear to have rendered it somewhat questionable, and unsettled, whether, where the tithes are not claimed by a spiritual rector, but have devolved to ecclesiastical corporations, who might have aliened till restrained by statute, or to lay impropriators, or their lessees, a grant or release of such tithes may not, under the circumstance of constant non-payment, be presumed. For in the latter of these cases, it was thus reasoned by the court, that the negative proposition would proceed on the ground, that a lay rector who can convey, contract, and diminish his right, which a spiritual rector is incapable of doing, is not to be barred from his right to any particular tithe by length of time, or the circumstances attending the receipt of his other tithes: Lord Loughborough C. declared his reluctance to go to that extent; yet his final determination has such an aspect. For on looking into the case before cited, negating the effect of presumption arising from non-payment, though his lordship expressly stated, he did not agree with it; yet he refused to compel a purchaser to take a title to land as exempt from tithes in the face of that decision, or to decree him

(b) Gwill, 1513. Oxenden v. Skinner. Gwill. 1620, Rose v. Calland.

to enter into a lawsuit. As (i) to the principle that a layman is incapable of tithes in pernaney, and that a grant of tithes to him is void; if not from the disability of the grantee to take, from the impropriety of the thing granted, this particular argument may be thought to have lost its force against presuming a non-apparent deed, since tithes are daily conveyed from person to person, (k) and it is no longer necessary to derive the title to them from one of the dissolved monasteries. And where there has been an actual pernaney of tithes by lay men under conveyances, as lay property for a long period of time, courts of equity will not afford their aid to disturb such a possession. Thus where in answer to a bill for an account of tithes, the defendants deduced their title, but without shewing its original commencement, to two-thirds of the tithes of the manor in question, from the time of Henry the eighth, accompanied with evidence that these lands paid only one-third of the tithes, that is, a thirtieth part of the produce to the rector, and were therefore called thirtiethable lands, the rector never receiving more than one-third, the lord of the manor receiving the other two-thirds, and letting some farms with those two-thirds to the occupiers; the bill was dismissed, and with costs against the plaintiff the purchaser of the advowson, being also lessee of the tithes who was affected with notice of what he in fact was purchasing (l). I should, therefore, rather ascribe the general maxim, that a prescription *de non decimando* is not allowable against a spiritual rector, to the great danger accruing to the church from the opposite doctrine, and should refer the comprehension of lay impropriators within the rule to the principle of uniformity. I have dwelt the longer on these matters as being very important, and because as

(i) Com. R. 649, 650.
Gwill. 762, 3.

(l) 2 Vef. Junr. 625. Gwill.
1430. Strutt v. Baker.

(k) Chap. II. ante.

to lay impropriators the subject may be considered as involved in some doubt.

A prescription strengthens all other titles; but, generally speaking, is of no force when pleaded in discharge of tithes; because the law presumes that a layman could not be absolutely discharged without the consent of the parson, the patron and the ordinary, and then also, as I have before observed, the grant of such discharge, or exemption must appear (*m*).

It is not, however, universally true that prescriptions *de non decimando* are illegal. The prerogative of the crown, the rights of spiritual persons in that character, and the case of dissolved monasteries form important exceptions to the maxim; and are all referable to, or at least consistent with the principle, that *ecclesia decimas non solvit ecclesiæ* (*n*).

I. With respect to this prerogative of the crown, the king is merely capable of prescribing *in non decimando*: without any prescription sufficiently proved, either express or implied, crown lands, although demesne, are not discharged from tithes (*o*). This capacity of the king's prescribing *in non decimando*, results from his being *persona mixta*, from his being invested with the supreme ecclesiastical jurisdiction as well as with the first civil magistracy of the realm (*p*). This privilege, although, generally speaking, personal in the king, extends to his lessee for years, or at will, for the possession of such tenant is in point of law, the

(*m*) Hicks v. Woodeson, Gwill. 550. Slade v. Drake. Hob. 514.
 295. Gwill. 385. 389. Jennings v. Lettis. Gw L. 952.
 (*n*) 2 Woodd. Vir. L. 99,
 (*o*) Compost v. Gwill.
 (*p*) Earl of Hertford v. Leec h Gwill. 494, 495.

possession

possession of the landlord; and, therefore, such lessee of the crown may also be discharged from tithes by a prescription *de non decimando* in the king and his farmers (q). If the law were different, this royal privilege would in a great measure be nugatory; since the king cannot cultivate his lands himself; but it extends to such lessee for years, or at will only. If the crown alien the freehold of the land so exempt, the patentee shall pay tithes, and the prescription is for ever extinguished, although the same lands should return to the crown again by escheat, or forfeiture (r).

II. So all ecclesiastical persons, as bishops, deans, prebendaries, parsons, and vicars, are, as formerly was the case of abbots, and priors, exempt from tithes in respect of lands which they hold in their spiritual character. A bishop shall not pay tithe out of lands which are parcel of his bishoprick. The rector shall not pay tithes to the vicar, nor *à converſo*; and so in case of lands belonging to a bishoprick, and consequently held discharged of tithes, which were conveyed to a layman, and afterwards reconveyed to the bishoprick, the prescription *non decimando* was held to be revived: Unity of possession will not extinguish it, nor a release of all the right to the land (s).

The lessees of spiritual persons, although such lessees be laymen, may also be discharged, if a prescription comprehending them be alledged, and proved. A bishop may prescribe in *non decimando*, in regard to lands part of his

(q) Williams v. Petchy, Com. Gwill. 514. Gibf. 673. Boha Dig. Tit. Dimes (E. 2.) Sed 282, 283.
vid. Gwill. 184.

(s) Bishop of Lincoln v.

(r) Earl of Hertford v. Leech, Cooper, Cro. Eliz 216. Gwill. 486. Compost v. 163.

bishoprick, for himself, and his farmers (*t*). His copyhold, or customary tenants may have the benefit of a similar prescription (*u*). For these spiritual lessors are presumed to derive the advantage of such exemption by the reservation of higher rents, or the acceptance of larger fines. The exemption therefore is consonant to the principle I have just expressed, that *ecclesia decimas non solvit ecclesiæ*. But this privilege does not extend to churchwardens in regard to lands settled for the repairs of the church (*v*). And if a rector demise his glebe free from all exactions, yet he is intitled to the tithes of it from his own tenant (*w*). So if he keeps the glebe in his own hands, and sow it with corn, and die before severance, his executor, or vendee, in case he had sold in his life-time, must pay tithe to the succeeding incumbent (*x*). So if he lease his rectory, reserving the glebe lands, he shall pay tithes in respect of them to his lessee. But if the vicar be specifically endowed of the small tithes of the glebe lands of the parsonage, he will be intitled to them, although such glebe be in the hands of the appropriator (*y*).

A county, or a hundred, or any well ascertained precinct may prescribe *in non decimando* (*z*). But this proposition must be understood with various qualifications, and as not infringing the general principle, that a lay-

(*t*) 1 R. A. 653. Deg. p. ii. c. 16. Wright v. Wright, Gwill. 167. See Benning v. Douce, Gwill. 622.

(*u*) Crouch v. Fryer, Cro. Eliz. 784. Gwill. 218. 2 Wooddes. Left. 102. in note. Stephenson v. Hill, Gwill. 894.

(*v*) 1 R. A. 653.

(*w*) Wats. C. L. 403 Ed. 1701. Sav. 3. Mo. 910. Cro. Eliz. 479. 578.

(*x*) Wats. 403.

(*y*) Gibs. 661. Deg. p. ii. c. 2.

(*z*) 3 Burn. Eccl. l. 5th Edit. 413. Hicks v. Woodeson 4 Mod. 336. Gwill. 550.

man shall not prescribe *in non decimando*. Such prescription shall be allowed only in cases of articles tithable by custom (a); but not in respect of things tithable of common right: And the ground of the distinction is this, that in respect to things tithable by custom, such districts may so prescribe, and be discharged, unless the existence of a custom derogatory to the ancient and ordinary right of exemption be proved; but with regard to articles tithable *de jure*, it were incongruous to say, that such districts should be capable of prescribing *in non decimando* in those instances, in which the individuals of whom it is composed, have no such privilege (b). Nor shall these districts plead a custom for an absolute discharge of their lands from the payment of all tithes without any substitution; a sufficient maintenance must be left to the parson (c). A claim of such exemption may be also invalid in respect to the territory to be covered by it, and was so decided in a recent case (d) where it extended to certain parishes enumerated in the answer, which had not any common denomination, or any mark, by which they could be considered as a distinct and separate district.

III. The last species of exception to the rule that a layman cannot prescribe *in non decimando* exists in respect to estates which formerly belonged to religious houses (e). All abbots, and priors, and other chief monks were

(a) 2 Wooddes. Lect. 99. 2 607. in not, Ruffel v. Partridge, Salk. 655, 656. 1 Lord Raym. 137. Gwill. 270.

(b) 2 Salk. 655. Lord Raym. (d) Nagle v. Edwards, 3 187. Gibs. 674. Smith v. John- Anstr. 702. Gwill. 1442.

son, Gwill. 606. (e) 3 Burn. Eccl. l. 5th Edit.

(c) Lord Raym. 187. Hicks, 394. 404.

71 Woodeson, Gwill. 550. Gwill.

originally subject to the payment of tithes, as well as other persons, until pope Pascal the second exempted generally all the religious orders from the payment of tithes in respect of lands in their respective possession; or as it was expressed *dum propriis manibus excoluntur*. This general discharge continued to exist until the time of king Henry the second, when pope Hadrian the fourth restrained it to the three religious orders of Cistercians, Templars, and Hospitallers; in whose favour the same exemption was established by the general council of the realm. These constituted the orders, which are commonly called the privileged orders, since they were intitled *ratione ordinis* to the privilege of being discharged from tithes of lands in their own occupation.

This privilege of exemption pope Innocent the third, in the year 1198, by a bull, or decretal epistle, attempted to extend to the order of Premonstratenses; and although such privilege appear by the (f) ledger book of the abbey of Cockerland belonging to that order, to have been allowed in the 12th year of the reign of Edward the third, and a definitive sentence given accordingly; and although (g) Seiden expressly mention, that they are exempted by that bull for lands of their own culture, yet it is now clearly held, that the bull did not exempt that order from the payment of tithes of lands in their own occupation, unless it were received, and allowed in England. But the books are silent as to the allowance of this privilege to the order of Premonstratenses, and consequently a title to hold lands discharged from the payment of tithes, either absolutely, or while in the manurance of

(f) See Gwill, 409. (g) Seld. Hist. of T. c. 13. p. 406.

the owners of the inheritance cannot be derived under that order (*b*).

All spiritual persons, or corporations, nevertheless, were capable of having their lands totally discharged of tithes by various other modes, as by real composition; by the pope's bull of exemption, if recognized by the laws of England; by prescription, having never been liable to tithes in consequence of having always been in spiritual hands.

But the council of Lateran, in the year 1215, which was a general law received in England (*i*), farther restrained the exemption of religious houses from the payment of tithes to those lands, of which they were in possession before that council.

The Cistercians, however, in a course of time, evaded this last mentioned restriction by procuring papal bulls to exempt their lands also which were leased in farms. To obviate this practice, the statute of the 2d of Henry the fourth, c. 4. was passed, by which it was enacted, that all persons of that, or any other order, religious or secular, who should put such bulls in execution, or should from thenceforth purchase such bulls, or by colour thereof should take advantage in any manner, should incur the penalties of a *præmunire* (*k*).

Thus the statute operated to prevent them from purchasing any such exemptions in future, but left their

(*b*) *Townley v. Tomlinson*, Hardr. 101. Gwill. 502.

Gwill. 1004.

(*k*) 3 Burn. Eccl. l. 403. 5th

(*i*) *Stavely v. Ullithorn*, edit.

privileges untouched as they existed before it passed; applicable to such lands only, as such religious persons were possessed of prior to the Lateran council just referred to: But after that council, they obtained many lands which consequently were not exempted. To these restraints imposed by the council of Lateran, and by the statute of the 2d of Henry the fourth succeeded another, arising from the operation of the statute of 27th of Henry the eighth, c. 28. By that statute various abbeys, or religious bodies were dissolved, and the discharges and exemptions of their lands from tithes expired and vanished with the spiritual bodies, to which they were annexed (*l*): and their lands, therefore, became tithable. But this consequence was obviated in respect of such abbeys and religious houses as were dissolved by the statute 31st of Henry the eighth, c. 13. by which it is enacted, that all persons who should come to the possession of the lands of any abbey thereby dissolved (*m*), should hold them free and discharged from tithes, in as large and ample a manner (*n*) as the abbeys themselves had formerly held them: And after a difference of opinion, it seems to be settled, that the possessions of the order of St. John of Jerusalem, which came to the crown by the statute of 32d of Henry the eighth, c. 24. are exempt from the payment of tithes, by force of the protection of the statute

(*l*) Slade v. Drake, Hob. 295. Gwill. 390. and capable of being discharged of tithes. Appendix.

(*m*) See catalogue of the monasteries of the yearly value of 200l. dissolved by Stat. 31 Henry VIII. (*n*) Hankey v. Gay, Bugh. 37. Gwill. 619.

of 31st of Henry the eighth, in the hands of the king and his grantees (o).

From this provision arose a new species of discharge unknown to the common law, the unity of the possession of the parsonage, and land tithable in the same persons; for if the monastery at the time of the dissolution, were seized of the lands and rectory, and had paid no tithes in respect of them within the memory of man, such lands shall now be exempted from the payment of tithes, on the ground of a (p) perpetual unity of possession, in contemplation of law, because the same persons who had the lands, having the parsonage, they could not pay tithes to themselves (q).

But to render such union valid, it must have been accompanied with certain incidents: First, it must have been *just*, that is, claimed by right, and founded on a lawful title, not the effect of disseisin, or other tortious or unjust act, for an union so produced would not have been a valid discharge within the statute. Secondly, it must have been *equal*; there must have been a fee simple, both in the lands, and in the tithes; as well in the lands from which the tithes arose, as in the parsonage, or rectory; for if those religious bodies had held the lands only by lease, that would not have amounted to such an union as the statute intended. Thirdly, it must have

(o) Cro. Jac. 58. W. Jon. Sir William Jones 182. Star v 182.—191. Freem. 299. Keble Elliot 1 Freem. 299.
 217. Gilb. Eq. Rep. 225. Gwill. (p) See Clavill v. Oram, Gwill.
 663. Urry v. Bowyer, Gwill. 1354.
 250. The Serjeant's case. Gwill. (q) God. 383. Boh. 241.
 281, Fosset v. Franklin, Sir 248. Slade v. Drake, Hob. 295.
 Thos. Raym. 225. Gwill. 1579. Gwill. 390.
 Whitton v. Weston, Gwill. 410.

been *free* ; free from the payment of any tithes, in any manner ; for if the abbots, or their farmers, or tenants for years, or at will, had paid any tithes whatever before the dissolution, it may be alleged as sufficient to avoid the unity pleaded in discharge of tithes. And fourthly, it must have been *perpetual* ; the religious houses must have been endowed time out of mind, and must have had in their hands both the lands, and the rectory united perpetually, or before the memory of man, that is, according to the rule prescribed by the common law, before the first year of Richard the first, discharged from tithes ; for if by records, or ancient deeds, or other legal evidence, it can be ascertained, that the lands, or the rectory, came to the abbey since that period of time, such union cannot be alledged to be perpetual (r). Nor merely from the abbey's being in possession of the lands at the time of its dissolution, shall an immemorial possession be presumed ; but to shew that the abbey had a right to prescribe, such immemorial possession must be proved (s). And, moreover, the lands of such religious houses as were privileged *ratione ordinis* were exempt, and discharged from the payment of tithes only during the time they were holden in their manurance, and occupation ; the exemption extended to their lands only *dum propriis manibus excolebantur* ; and consequently the lands of such houses as were dissolved by the statute of 31st of Henry the eighth, shall be free from the payment of tithes only to the same extent, as they were discharged, while they belonged to such religious houses ; that is to say, while they are in the hands and manurance of the owners of them : It is requisite therefore for a party who claims such privilege of exemption expressly to alledge and

(r) Boh. 248. 250.

(s) Clavill v. Oram, Gwill.

prove that he is in the occupation, and manurance of the lands for his own use. It is not sufficient for him for this purpose to state, that he is seised of the lands, for he may be seised of them, and yet another may manure and occupy them (t).

It has been remarked (u), that it seems extraordinary that this distinction between occupiers, and owners should have been continued since the statute, for that it is evident that no personal privilege to laymen was intended by the statute; but merely an estate in that condition. But this exemption from tithes is so narrowed only in those cases, in which the religious houses were privileged *ratione ordinis*. They were by other means, as we have just seen, capable of an absolute discharge, and then their privilege was not restricted to lands in their actual occupation, but extended also to lands in the possession of their tenants; therefore, in a case (v) in which it was in evidence, that the lands in question belonged to one of the greater houses dissolved by statute 31st of Henry the eighth, and that they had never paid tithes, the court presumed an absolute, not a qualified exemption; not merely a limited discharge, while in the hands of the owner of the inheritance, but a general discharge while in the hands of the occupier also; although it were more-over in proof, that the house was a Cistercian abbey; that other lands, part of the same farm, paid tithes, while in the hands of tenants, and that the lands in question were never in lease.

(t) Fox v. Bradwell. Com. Rep. 498. See also Cowley v. Keys, Gwill. 1308. 1309.

(u) By Clarke, Baron, Gwill.

821.

(v) Ingram v. Thackstone, Gwill. 819.

Nor is it a sufficient ground of objection to such discharge from tithes, that the lands were in the occupation of a lessee under a lease granted by the abbey, and subsisting at the time of its dissolution; for although in the case of *Lord v. Turk* (*w*) it was held that the lands which had belonged to the Cistercian order were not so discharged, because it appeared that they were in the hands of tenants at the time of the dissolution of that order, and consequently were not discharged when they devolved by virtue of the statute, upon king Henry the eighth; and although in the case of *Cowley v. Keys* (***), in which it appeared that the lands in question belonged to the abbey of Coggleshall, admitted on all sides to have been one of the greater abbeys, and were not in the actual occupation of the abbot, and convent at the time of their dissolution; and it was strenuously contended that the words of the statute of the 31st of Henry the eighth, c. 13, namely, "have, hold, occupy, possess, use, retain, and enjoy," are very precise and strong, and evidently confine the exemption to the lands actually in the occupation of the abbey, at the time of the dissolution; that they were not, therefore, within the saving of the statute: and moreover the case of *Lord v. Turk* was urged in support of that construction, yet the Court, on the authority of *Porter v. Bathurst* (*y*) determined on a special verdict in prohibition, as well as on principle, and the reason of the thing, were clearly of opinion that the words referred to in the statute ought not to be restrained, so as to

(*w*) *Bunb.* 122. See also (*y*) *Porter v. Bathurst*, *Cro. Dickinson v. Reade*, *Gwill.* 358. *Jac.* 554, 559. *Gwill.* 132, in
 (***) *Gwill.* 1308. *net.* and 373.

pass only a possessory right; that the words "have" and "hold" are constantly made use of to convey the largest estates, and do not apply merely to manurance; that there could be no doubt of the existence of the privilege at the time of the dissolution, suspended, indeed, in point of benefit, but continuing in point of right; it being clear that the privilege was not destroyed by the lands going out of the hands of the abbey; but would result to them together with the lands, and was, therefore, subject to the provision of the statute (z).

But where an abbot, having a privilege to be discharged of tithes, *quamdiu manibus propriis*, in the time of Edward the fourth, made a gift in tail, and the abbey, was dissolved by stat. 31st of Henry the eighth, it was clearly held that the donee of the issue should not be discharged, for the statute discharges none, but as the abbot was discharged at the time of the dissolution, so that the party must claim the estate, and discharge under the abbot since the statute; and the consequence would have been the same, if by a common recovery the reversion had been barred before, or subsequently to the statute (a).

It is not, however, requisite that the owner of lands formerly part of the possessions of a greater abbey, should hold them in fee simple, in order to their being discharged from tithes. It is clear that a tenant in tail of such lands is discharged, *quamdiu propriis manibus excoluntur*. Nor is it necessary to such discharge, that the owner should

(z) See Gwill. 432.

248. Gwill. 431.

(a) Farmer v. Shereman, Hob.

have an estate of inheritance in such lands (*b*). In a case (*c*) in which a party who claimed the exemption, as having the lands in his manurance, was only tenant for life under a settlement, with a remainder in tail to his daughter; although it was insisted, in opposition to his claim, that he had not that quantity of interest in him, which could support the privilege; that to entitle the lands to the exemption, the person occupying them must be the owner of the inheritance, and have the same estate in him which the monastery had; and the case of *Wilson v. Redman* (*d*) was cited as an authority to shew that a tenant for life, or years, is not within the statute, and that, therefore, the privilege contended for could not attach; yet the court decreed that the tenant for life was exempt, observing, that in the case of *Wilson v. Redman* the parties appear to have had a fee simple, and therefore it not being necessary in that case to decide the point, it could not be considered as of any authority respecting it: that it is impossible that the lands can now be holden precisely in the same manner as they were holden by the monastery: that the monastery had them, to them and their successors, but a man now has them to him and his heirs. That as a fee simple may be divided into portions, into different estates for life, in tail, and remainder in fee; where is the difficulty in saying that the tenants of each portion shall have the benefit as they succeed? That there is no reason why a tenant for life should be excluded from the benefit, any more than a tenant in tail, who it is agreed is exempt, or why all the component parts of the estate should not be exempt as they severally come into

(*b*) *Brownl.* 44. *Gwill.* 1516.

(*d*) *Hardr.* 174.

(*c*) *Hett v. Meeds*, *Gwill.*

1515.

possession ; but such exemption cannot be insisted on if the lands be in the hands of a lessee for years, or even for life, under a common lease ; for there is a material difference between a person who is merely a lessee for life, and one who is tenant for life, under a will or a grant ; the latter has that very estate in him which the monks themselves had, for they were not the owners of the inheritance, they had the enjoyment only during their lives (f).

If lands were discharged of tithes in the hands of a prior, and the priory were vested in the king by the stat. of the 31st of Henry the eighth, so that such discharge as existed in the priory ought by law to continue ; although tithes shall have been paid ever since the passing of the statute, yet it was held that even such constant payment should not operate so as to make the lands chargeable (g).

Also, where lands were exempted from tithes, as being parcel of the demesne of an ancient monastery which were enclosed by act of parliament, it was held that they were not rendered liable to tithes, by a clause in the act, providing that the rector, or impropriator of the parish, or his lessee, should receive all kinds of tithes from the new enclosure act, notwithstanding any modus, or pretence of a modus, or composition in any other parts of the parish, or any exemption whatsoever, on the ground that such general words ought not to destroy a

(f) *Argdo, Gwill 1516.* *Lady Denton, Gwill. 363.*

(g) *Earl of Clanricard v.*

clear legal exemption, when the whole scope of the clauses was to preserve merely such right as the impropriator, or his lessee, had at the time of passing the act (b).

(b) *Pratt v. Hopkins*, 3 Bro. P. C. 521. Gwill. 704.

CHAPTER THE EIGHTH.

Exemptions partial.

HAVING discussed the doctrine of general exemption from the payment of tithes, I proceed now to the consideration of such species of exemption as are merely partial, which comprise, as I have before remarked, moduses, and compositions (*a*).

The proper definition of a *modus decimandi*, or in common language a *modus*, is a composition for tithes which has existed from time immemorial (*b*); or in other words, where by custom, or prescription a particular mode of tithing has subsisted different from that authorised by the general law. Before the restrictive statutes, the parson, patron, and ordinary were capable of binding the revenues of the church. A *modus*, therefore, shall be presumed to have had its commencement from an instrument signed by those parties, which has been lost by lapse of time (*c*); but then there can be no colour of reason for saying, that because such instrument has been lost, the composition established by it should be lost also (*d*).

There are various descriptions of moduses. A *modus* is sometimes a pecuniary compensation, as two-pence an acre for the tithe of land: sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration

(*a*) Supr. 164.

3 Anstr. 638.

(*b*) Per Holt C. J. *Startup v. Dodderidge*, Gwill. 591.

(*d*) *Chapman v. Monson*, 2 P. Wms. 573.

(*c*) *Ord v. Clark*, Gwill. 1437.

of the owner's making it for him : sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity, as a certain number of fowls in lieu of tithe eggs (*e*).

Moduses are also distinguishable with reference to the extent of the lands which they cover. A general custom prevailing throughout a parish is different from a prescription for a particular farm. The former species is called a parochial, and the latter a farm modus. A parochial modus extends to all tithes of that species, which arise within the district ; but a farm modus depends upon more particular circumstances, and is more strictly confined (*f*).

Such is the general nature of a modus ; but it is necessary to take a more minute view of its various incidents, and properties.

There are many requisites to constitute its validity ;

1. A modus must be fixed and invariable, or, in other words, a certain recompence for a certain duty.
2. Such substitution for tithes must in its origin have been beneficial to parson, and not for the emolument merely of third persons.
3. It must be different from the article compounded for.
4. A modus for one species of tithes shall be no discharge for the payment of any other species.
5. It must be as durable in its nature, as the tithes discharged by it.

Lastly, It must not be too large, which the law denominates a rank modus.

In respect to the first of these properties, that a modus must be certain and invariable, it is a necessary conse-

(*e*) *Somerton v. Cotton*, Gwill. See also *Austin v. Pigot*, Gwill. 199. Cro. Eliz. 587. 2 Bl. Com. 217, Cro. Eliz. 736. & sup. 63. 29.

(*f*) Gwill. 1323.

quence of its having been an original real composition, which in its essence must have always been one and the same; an uncertain, or fluctuating payment, or in legal language a defultory, or leaping modus could not have been settled from time immemorial. Therefore, it has been held, that if a party has paid a penny for a lamb for fifty years, and afterwards pays tithe in kind before the custom is established, although he again pay a penny for twenty years, he cannot prescribe *in modo decimandi* (g). So a modus of one shilling for every fat bullock, agisted within the parish in lieu of the tithes of agistment of all barren and unprofitable cattle agisted upon lands within the parish, and a modus of one penny for any small quantity of hemp sown every year, by every occupier of lands within the parish were disallowed (h). So a modus to pay a penny, or *thereabouts*, for every acre of arable land, is illegal (i). So a modus to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, has been adjudged invalid, it being uncertain what would be the amount of every day's ploughing (k). So a modus to pay two shillings in the pound out of the rent reserved (l), or a modus to pay one shilling in the pound on the yearly rent of rank-rented farms (m), is void: A custom is not applicable to rents reserved from time to time, on frequent new reservations. On the same principle, a modus to pay the yearly value of farms which are underlet is also bad (n). On the same ground of uncertainty an alleged modus of three-pence payable by the occupiers of every ox-gang of land, containing

(g) *Fleming v. the Tenants of Dudley*. Sav. 13. Gwill. 155. Deg. 308.

(h) *Boscawen v. Roberts*, Gwill. 946,

(i) 2 Roll. Abr. 265.

(k) *Cunn. L. of T.* 45.

(l) *Byne v. Dodderidge*, Gwill. 578. Vid. *Startup v. Dodderidge*, Gwill. 587. 591, 592.

(m) *Bean v. Lee*, Gwill. 609.

(n) *Ibid.*

sixteen acres of arable, meadow, and pasture, after the rate of seven yards to the pole or perch, in lieu of the tithe of hay arising on the ox-gang, has been held invalid; for that there was no specification of the proportions of such different species of land, and there was nothing to pay for an ox-gang of arable only, or an ox-gang of arable, and pasture. By the fluctuation, therefore, of lands in the parish it might happen that the arable might be occupied separately from the meadow, or pasture. It would have been a very different case, if the ox-gang had been computed on the actual state of the occupation, on the day on which the tithe was to be demanded, as on every sixteen acres, consisting of all the arable, and all the meadow, and all the pasture that each man had; for, on that supposition, the whole parish would contribute to the vicar a certain sum at all events; because then, all the lands in the parish, reduced to their own proper ox-gang, would contribute their proportions to one fixed and certain recompence for the tithe of the meadow land, which would be always payable to the vicar out of the specific lands, independent of the uncertainty, and fluctuation of the occupation (o). A modus of the sum of one penny usually called *tilth-penny*, to be annually paid by the respective occupiers in lieu of all tithe hay arising on lands part of certain tenements, was also held incapable of being supported, it being a recompence for a tithe wholly uncertain, fluctuating in its amount, varying according to the changes in the occupation of the lands, to be reduced to a single penny, if not to be wholly annihilated; for according to such a modus, if a man has sixty acres of hay, he pays only one penny, and if he lets them to sixty several persons, they shall pay one penny each; and the converse of the proposition more strongly evinces its unfairness: if sixty persons pay one penny, and they let their land to

(o) *Ma. ham v. Laycock*, Gwill. 1339.

one individual person, one penny only shall be paid (p). A modus, that all occupiers of farm houses on the north side of a certain lane, with the lands *usually* occupied therewith, have time out of mind paid three-pence at Michaelmas in each year for each cow, and all occupiers above the same lane, or on the south side thereof, with the lands *usually* occupied therewith, have time out of mind paid two-pence for each cow in lieu of tithe of milk in kind, has been declared to be uncertain and void; for that the house may fall down and be uninhabited, and then no modus will be payable; nor can any description be more uncertain than that of lands *usually* enjoyed with the tenement, since the lands let with the farm house may be often changed (q). A modus, that the occupiers of Shortflat-bog, called I arfons-bounds, a wet swampy uncultivated piece of ground lying within the hamlet of Shortflat, have time out of mind annually cut and made into hay of the grass growing thereon two fother, and carried the same at their own expence to the vicarage-house, in satisfaction for tithe-hay of the whole township or hamlet, and that the same hath been and ought to be accepted as such, and that a fother is a certain determinate quantity well-known in those parts, which was proved by the witnesses on both sides to be as much as can be drawn in a long wain by two oxen and two horses, it was held, that this modus was void, on the ground that the fother, as described by the witnesses, was too uncertain; that it made the quantity of hay depend on the condition of the soil, on the strength of the oxen, and the horses, and on the caprice of the occupier, who might take the opportunity to carry it in wet weather, when the bog is

(p) *Travis v. Oxton*, 3 Gwill. Bunb. 80.
 1066. 1081, 1082. See also (q) *Carlton v. Brightwell*,
Turton v. Clayton, Gwill. 628. Gwill. 676. 2 P. Wms. 462.

scarcely passable (*r*). A modus of four shillings payable at Easter, in lieu of tithe-hay arising on defendant's farm, has also been held void, it not being certain of what a farm consists (*s*). A modus, that there was a meadow in the parish called Parson's-meadow, and that the plaintiff and his predecessors had time out of mind enjoyed the meadow, and also various beast-grasses in the parish, in lieu of the tithes within the parish, was declared by the court not to be good by reason of its uncertainty (*t*): And in a case, in which the defendant insisted on a modus that the occupiers of ancient tenements, within particular vills or townships described within the parish, with their own carriages and horses, led and carried, and ought to lead and carry, a cart-load of peat and turf from Ulverston-moss to the parsonage-house for the use of the parson and rector, his farmer or deputy on such a day, or within the space of every two years, as the parson or rector, or his farmer and deputy, should require the same, in full discharge of all the tithe of hemp, flax, and hay arising on those ancient tenements, was held to be a void modus, for a cart-load is too uncertain, it may be drawn by two, or six horses (*u*). A modus for the payment of a certain sum of money, but if the lands are in the possession of any other person to pay tithe in kind, or the money at the election of the parson, held to be clearly bad, as being defultory (*v*). A modus alleged to be payable *at Easter, or otherwise, when the sheep shall be sold*, held to be of the same description, and adjudged void (*w*). A modus of nine-pence a cow depastured on the

(*r*) Fenwick v. Lambe, Gwill. 644. Bunb. 126.

869. Ambl. 365.

(*v*) Webber v. Taylor, Gwill.

(*s*) Burwell v. Coates, Gwill. 656. Sel. Cas. in Ch.

646. Bunb. 129.

(*w*) Philips v. Symes, Gwill.

(*t*) Birch v. Stone, Gwill. 649. 654. Bunb. 171.

(*u*) Tully v. Kilner, Gwill.

meadows,

meadows, and six-pence a cow depastured on the uplands, in lieu of the tithes of all cows, calves, and milk, was also overruled; principally, because the recompence is too vague, for that the parson, in lieu of a certain right at common law, must have a right equally certain by the prescription; and in this case, if a cow were depastured partly on the uplands, and partly on the meadows, he would not know which modus to demand, or how to distinguish them (*).

On the other hand, if tenants from time immemorial have been used to pay a certain price for a tithe-lamb, so that the custom is fully established, the custom shall not be destroyed by the parson's encroaching on more, or the tenant's payment of the tithe in kind (y). So a modus in lieu of tithe-milk to pay every tenth day's cheese during the space of twenty weeks, the first cheese to be paid on fifteen days after Holyrood-day, seems to have been considered as valid, notwithstanding the objection of uncertainty, and yet it was not stated that one whole day's milk should be used in making it (z). So six shillings and eight-pence for every yard of land for tithes, is a good modus, although the lands be uncertain (a). In like manner a modus of twelve pence for a fat beast, bullock, or heifer, and six-pence for every lean beast, bullock, or heifer, was held good, notwithstanding it was objected, that there was an evident uncertainty, as it would be necessary to determine in every instance whether the animal was fat, or lean; but the lord Chancellor observed, that this was a distinction perfectly well established

(*) *Torrano v. Legge*, Gwill. 909, and in not. and 1 Bl. Rep. 420. (z) *Wake v. Rufe*, Gwill. 1396. 1 Anstr. 295. and see 1 Roll. Abr 651. pl. 19.

(y) *Fleming v. Tenants of Dudley*, Gwill. 135. Sav. 13. (a) *Mason v. Hine*, Gwill. 951.

among

among farmers, and he, therefore, saw no legal objection to the modus (*b*).

Certainty being thus essential to the validity of a modus, it is requisite in a bill in equity claiming to establish such substitution for tithes to state it with reasonable particularity, and precision.

Thus, a modus to pay a penny for every ancient farm in a parish, being a farm, and not a parochial modus, the boundaries and particular quantities of land of each farm, alledged to be covered by such a modus, must be stated: For it is essential that the parson should be apprized to what lands he is to resort for payment of the modus (*c*). But even in a bill the court does not require a scrupulous strictness in alledging a modus; thus in a bill to establish a modus for ancient orchards, it is not necessary to set out the quantity and boundaries of the orchards, for that is a very distinct case from the case of an ancient farm: the name of an orchard is in the nature of a description and the mere inspection will help to ascertain it (*d*). So, although formerly it was held that in a bill to establish a modus, a day for the payment of it must be expressly alledged and proved (*e*); yet, according to modern adjudications, that is no longer necessary, and it is now considered as too strict to require the proof of a particular day; that to state that the modus is payable at or about a particular day is sufficient (*f*); and the court will establish a modus, even though proved to be payable

(*b*) *Bishop v. Chichester*, Gwill. 631. Bunb. 105. *Goodwin v. Wortley*, Gwill. 715. See also 1316. 1320.

(*c*) *Scott v. Allgood*, Gwill. Penrice v. Dugard, Gwill. 632. 1369.

(*d*) *Ibid.* 1371.

(*f*) *Richards v. Evans*, Gwill. 802. 1 Ves. 30.

(*e*) *Goddard v. Keble*, Gwill.

on a day different from that alledged in the bill (g). So on a bill to establish a modus, it was objected, that the modus was not properly set out, being pleaded as a farm modus, and the farm not stated to be ancient, and to have consisted immemorially of the same parcels as at that time, and it was urged that the defendant was not bound to extract the plaintiff's meaning by inferences; but the court were of opinion, that as the bill set out the farm with all its parcels, the number of acres, and the abutments of each close, and averred that the modus had been immemorially paid by the farm, its antiquity was a necessary part of the plaintiff's case; and that such allegation could be supported only by proving that the farm was ancient, and had immemorially continued the same; that no precise words in such case are necessary if the meaning be clear (b). Nor is it necessary either in law or equity, in laying a modus to use that express term: Accordingly, a bill, to establish a customary payment of seven pounds per annum in lieu and satisfaction of tithes, was held to contain a sufficient allegation of a modus: Lord Hardwicke C. in such case observing, that the material words are, so much money paid in lieu, and satisfaction of tithes (i).

But in an answer insisting on a modus by way of defence still greater latitude is admissible, on this distinction: that if a bill be filed by a landholder to establish a modus, it is reasonable, that he should be restricted to an accurate statement of his claim, for he is bound to know it, before he asserts it in a court of justice; but in the case of an answer, a tenant is compelled within a limited time to answer, and state his defence, and if he give such a state-

(g) *Anderton v. Davies*, Gwill. 1434.

1268.

(i) *Richards v. Evans*, Gwill.

(b) *Lord Stawell v. Atkins*, 802. 1 Vef. 30.

ment as will apprise the plaintiff of the general nature of the case to be made against him, it shall be sufficient (*k*). Thus, where the defendant insisted on a modus of fourpence for every acre of grafs cut and made into hay in lieu of the tithe of hay, to which it was objected, that it was illegal, inasmuch as it was not stated to be so in proportion for a greater or less quantity than an acre; the objection was overruled, and the modus declared to be sufficiently set forth. So in the same cause, the defendant stated, that there were several lands the parish, which were exempt from tithes, and that there were other lands of which the rector was entitled only to a moiety of the tithes, and the above modus in lieu of tithe-hay was laid for every acre of grafs, except on the lands which were tithe-free, and those for which tithes were paid in moieties: an objection was taken to the legality of the modus, because the defendant had not particularly set out the lands, which he stated to be exempt, or for which tithes were due in moieties; but this objection was also overruled (*l*). So where the defendants in their answer set up an immemorial payment due and payable by the owners or occupiers of lands, by way of modus, or composition for the small tithes, it was contended that the modus was not set forth with sufficient certainty; it being pleaded as a modus, or composition, whereas the claim of exemption, being against common right, must be accurately defined: But the court, recognising the distinction, I have just alluded to, held, that if this had been a bill to establish the modus, the objection might have prevailed, but that in an answer, such strictness is not requisite; if it appear that there is a good defence, that is sufficient, and there-

(*k*) *Baker v. Athell*, Gwill. Brooke, Gwill. 1412. Anstr. 397. 1423. 2 Anstr. 491. See also (*l*) *Gills v. Horrex*, Gwill. *Atkyns v. Lord Willoughby de* 861.

fore, disallowed the objection (*m*). So where to a bill for vicarial tithes the defendant in his answer set up a modus for an estate, of which he was owner, called H. without mentioning its extent, but which in the bill was stated to consist of two hundred acres, the manner of laying the modus was objected to for uncertainty; but the lord chief baron observed, that the object in stating the number of acres was to ascertain the land; that if it be ascertained by other means, the end is answered, and expressed his doubt of the validity of the objection; and although the other barons thought that the name did not give sufficient certainty, and that it was not supplied by the bill; yet the objection seems to have been considered as very critical, and the court permitted the answer to be amended (*n*). Again, in a case, in which the defendant insisted on a modus without averring it to be immemorial, acknowledging that he did not know how long it had subsisted, and also omitting to state at what time it was payable, the court held the answer to be nevertheless sufficient (*o*).

The indulgence of the court to defendants in cases of this nature, is still more strongly evinced in the following instance: To a bill for tithes of apples, except ancient orchards, in respect to which the bill admitted a modus, the answer, which was very confused and indistinct, set out the copy of a paper-writing purporting to be an account of a modus in the parish, which the defendant stated he believed to be true, and added these words, "Cyder two-pence per hoghead." It was insisted on

(*m*) *Atkyns v. Lord Willough-* 1124.

By de Brooke, Gwill. 1412. (*o*) *Baker v. Athill, Gwill.*

Anstr. 397.

1423. *Anstr.* 491.

(*) *Vyle v. Duntze, Gwill.*

the part of the plaintiff, that it did not appear what the modus was, which even in an answer, ought to be set out with some degree of certainty, in order that the plaintiff may know on what the defendant relies, and how to apply his evidence; but Sir Thomas Clarke M. R. held, that if it appear, that a pecuniary payment was made for any species of tithe, the court will help the imperfection in the manner of setting out the modus, and put a construction on the words. He accordingly directed an issue to try whether a modus of two-pence per hoghead of cyder was payable throughout the parish, in lieu and satisfaction of tithes in kind for the apples which were used in making such cyder (*p*).

And with the same liberality superfluous words used in an answer stating a modus, which would make it indefinite, have been considered by the court as expunged. Thus where a modus of three-pence per head for every sheep brought into the parish a short time before the 13th of February, was objected to as too vague: It was held that these words should be rejected as unnecessary (*q*). Nor shall even a variation of the witnesses in the description of the land vitiate a modus, provided they agree in pointing out the particular land, which is covered by it (*r*).

But still this latitude permitted to answers is not wholly unlimited, for where the defendant insists on a parochial modus, he must state in his answer to whom it is payable, and what particular lands in his occupation are covered by it (*s*). So where in an answer a farm modus was laid for all tithes, except those of corn and grain,

(*p*) Mallock v. Browne, Gwill. 905. Ambl. 423.

(*q*) Ellis v. Saul, Gwill. 1326. 1335. Anstr. 332.

(*r*) Markham v. Huxley, Gwill. 1499.

(*s*) Coggan v. Lord Londale, Gwill. 1404.

and the tithes due to the vicar, it was held not to be sufficiently certain for want of distinguishing what tithes the *modus* covered (*t*). So where the defendants in their answer admitted the rector to be entitled to tithes in kind, except in the township of Risby, which they stated to consist of nine hundred and thirty acres, or thereabouts, of which they alleged, 1, certain parts to be demesne of the manor or lordship of Risby, and to contain one hundred and fifty-six acres, or thereabouts; 2, other parts to be ancient enclosures, and to contain four hundred and thirty-two acres, or thereabouts; and 3, the remainder to be three hundred and forty-two acres, or thereabouts, and insisted on a *modus*, first for the demesne lands three pounds two shillings, for the ancient enclosures one pound ten shillings and threepence, for all the land in Risby accustomed to pay tithe in kind twelve pounds, which amounting together to sixteen pounds ten shillings had been immemorially paid, after allowing the land-tax amounting sometimes to one pound, and sometimes to one pound four shillings, as a *modus* in lieu of all tithe within those several lands: The defendants not having in their answer ascertained the three different species of land, the court held that it was impossible to direct issues on any of these *moduses*, though the court at the same time expressed a wish to relieve the defendants from the difficulty of having subjoined the third to the two others; but observed, that if a decree were pronounced only for an account of the third description, when the rector came for his tithes, his claim might be frustrated by the occupiers insisting, that these were demesne or old enclosures; an account was, therefore decreed of all the tithes demanded by the bill with costs; but without prejudice to any future claim to the benefit of the *moduses* defectively set forth in the answer (*u*). In

(*t*) *Nash v. Thorn, Gwill.* 1324.
 (*u*) *Croft v. Ayer, Gwill.* 1325.

like manner to a bill for several species of tithes, and particularly for agistment, two of the defendants in their joint answer set up a modus to cover the agistment tithes, one of whom stated that he held as owner certain lands within that township of T., consisting of twenty acres or thereabouts, and also of seven beast gates, or cattle gates, in certain open pastures there called A. and B., together with common of pasture on the moors or commons within the township, which farm, lands, or grounds were part of an ancient estate within that township, which theretofore belonged to J. C. ; that the other part thereof consisted of eleven acres of meadow land, or thereabouts, and three beast gates, or cattle gates, and that the last mentioned premises also belonged to the defendant, but during the said years were let out to tenants. The answer then set forth, that the defendant held as owner certain other lands there, consisting of twenty acres, or thereabouts, which were parcel of an ancient estate within the township, which theretofore, belonged to W. A., the other part of which consisted of twenty acres, or thereabouts. The description of the lands held by the other defendant was similar, being parcel of another ancient estate. They then set forth certain moduses payable for those ancient estates respectively. There was evidence to shew the extent and boundaries of the several ancient estates. On its being objected on the part of the plaintiff, that the description of the places covered by the modus was not sufficiently certain, the court held, that although it be true, that in an answer considerable indulgence be shewn in stating the defence, and the evidence here made the case more intelligible, yet that the defendant must not give a blind description, which the plaintiff cannot meet ; that the defendants had not defined with reasonable precision the ancient estates, with respect to which the several moduses were claimed ; that they

had described the closes held by them no otherwise than as lands of certain extent : They had neither named the parcels, nor specified the boundaries ; that the description of the ancient farms, of which these lands were parcels, was equally indefinite ; they are stated merely to lie in some part of the township of T. ; but there is no clue to discover their particular locality ; whereas there ought to have been such a reasonable precision in their description as would enable a sheriff to give possession of the closes ; but this description is clearly insufficient for that purpose. No issue could be directed upon this defence. The issue is in general in the words, or nearly in the words of the answer ; but here there is no description of the place covered by the modus : there is nothing, therefore, to try by an issue. Where there is an inaccuracy in the answer in describing the defence, an indorsement on the *postea* may remedy the error : here the description is totally wanting, an indorsement, therefore, could not assist the case (v).

II. A modus must in its origin have been beneficial to the parson, and not for the emolument merely of third persons.

Thus a modus to find straw for the body of the church is no valid modus in discharge of tithes, for the parson is not bound to find such straw, and consequently he derives no benefit from it (w). But if it had been alleged that the straw was given to him, and he bestowed it on the body of the church ; or that he had a seat in the body of the church, the adjudication would have been diffe-

(v) Wood v. Wray, Gwill.
1457. Anstr. 838.

(w) Scory v. Baber, Gwill.
163.

rent (*x*). So a modus to repair the church in discharge of tithes is not good, because that is an advantage to the parish only; but to repair the chancel is a valid modus, because that is an advantage to the parson (*y*). So where a party prescribed, that he used to pay the parish-clerk his wages in satisfaction of tithe-hay, this was held to be no discharge (*z*); and upon the same principle, if a custom be insisted on in the spiritual court in satisfaction of tithes, which gives no recompence to the parson, a prohibition shall not be granted (*a*).

III. A modus must be different from the article compounded for. It is absurd to suppose, that a part could ever be accepted as a satisfaction for the whole; therefore one load of hay in lieu of all tithe-hay, is no valid modus, for no parson would *bonâ fide* consent to receive a composition for less than is due of the same species of tithe, and therefore the law presumes it impossible for such composition to have been entered into (*b*). In like manner a certain number of sheaves of corn in satisfaction of all tithes of corn, has been determined to be a void prescription (*c*). So, in a case where the defendant insisted, that a small meadow had always been enjoyed by the rector in lieu of the tithe of hay of another meadow of a much larger extent, and it appeared that the first meadow produced every year on an average about four loads of hay, and the other about one hundred and fifty loads, the court disallowed the modus, observing that it could not be presumed, that any person in his senses would consent to take four loads instead

(*x*) *Scory v. Baber*, Gwill. 163. 285. *Portingen v. Johnson*, Gwill.

(*y*) 1 Roll. Abr. 649. pl. 50. 286.

(*z*) *Sarell v. Wood*. Gwill. (*b*) Lev. 179.

157. Cro. Eliz 71. & Gwill. 163. (*c*) *Sheppard v. Penrose*, Lev.
Deg. p. 2 c. 16. 179.

(*a*) v. Barnes, Gwill.

of fifteen (*d*). So, where a modus was alleged that tithe-milk ought to be paid by every tenth evening and morning's meal in kind, from Hoe Monday to the second day of November, to commence upon the evening of Hoe Monday, (that is the Monday fortnight after Easter-day) and the morning following to be taken by the rector at the place of milking, and no tithe-milk to be paid for the residue of the year; such alleged modus was held to be void upon the face of it, being only payment of part for the whole (*e*). But three eggs for every cock and drake payable on Wednesday before Easter, and for every hen and duck respectively three eggs in lieu of tithe-eggs, chickens, and ducks hatched in the parish, have been decided to be good moduses (*f*). So a prescription to pay the tenth cock of barley in discharge of the tithes of the rakings *minus voluntariè* (*g*) dispersed, has been established. And in no instance does this principle appear applicable to articles tithable merely by custom, but only to articles tithable *de jure*.

It is sufficiently obvious, that the cases I have above alluded to (*b*), in which the parson shall take less than a tenth of any specific article, having a compensation in the parishioner's work and labour, or in the greater maturity of the article, do not fall within this class of decisions. Therefore, a custom to cut down the grass growing upon the meadows, and to make it into hay at the tenant's expence, and to set out the tenth cock is a good prescription in satisfaction of the tithe of the latter mowth, as well as of the first mowth (*i*). So in case of a modus,

(*d*) *Mason v. Holton*, 3 Burn. Eccl. L. 421.

(*e*) *Brinklow v. Edmunds*, Gwill. 712. Bunb. 307.

(*f*) *Ibid.* Gwill. 712. Bunb.

(*g*) *Green v. Hun*, Gwill. 215. Cro Eliz. 702

(*b*) *Hall v. Fettyplace*, Gwill. 222. Cro. Jac. 42.

(*i*) *Supra*, 183.

that in consideration of the parishioners at their own costs and charges, making the tithe grass into hay, by strewing the grass upon the ground, which is called tedding it, and afterwards gathering it into weeks and windrows; therefore the parishioners and inhabitants within the parish were to pay no tithes for the herbage of dry, and unprofitable cattle; the lord Chancellor observed, that this might be a good modus to excuse the occupier of the same land, in which the parishioners made grass into hay, from paying tithe of after herbage, yet it could be no good modus to excuse the herbage-tithe of other land; for by parity of reason, a man might mow and make into hay a small parcel of ground containing about a quarter, or half an acre of land, and by those means be excused from the tithe-herbage of a hundred head of cattle; and although in that case it was proved that the parishioners, time out of mind, had paid no tithe of dry herbage, yet on the other hand it was proved that foreigners living out of the parish, and having no privilege of being tithe-free as to their herbage, made the tithe grass into hay, as well as the inhabitants, and paid tithe herbage; his lordship thought this a material objection to the custom, as it appeared to be the usage of the parish for the parishioners to make their grass into hay of course (*k*),

IV. Payment of one species of tithes cannot be discharged by a modus of another species of tithes. Thus a custom, that every parishioner should pay for every milch cow one penny by the year, and for every other cow a halfpenny per annum, in recompence and discharge of all tithes of cows, oxen, steers, and calves; and also, a penny for every mare, in discharge of all tithes of horses, mares, and colts there, has been adjudged bad, for tithes paid for one thing cannot be intended as a recompence

(*k*) Gwill. 697. 2 P. Wms. 520.

for the tithes of another, where tithe is of common right due for both (1). In like manner, where a party prescribed to pay the tenth part of corn in the sheaf, for the tithes of all which is in the sheaf, and of all which is raked, the prescription was adjudged to be void, because he was liable to pay tithes of both (m). Upon the same principle, a modus of fourpence for every orchard, in lieu of the tithes of all fruit trees in the parish was overruled, as being a modus of one tithe in lieu of another (n).

V. The compensation must be as durable in its nature as the tithe discharged by it, because tithe in kind is a certain inheritance, and there is no colour of reason that the right to it should be extinguished by a less permanent recompence; therefore, a modus that every inhabitant of a house shall pay four-pence a year, in satisfaction of the owner's tithes, is no good modus, for possibly the house may become dilapidated, or be without an occupier (o). A modus likewise for the tithe of articles of comparatively recent introduction into England, as turkeys, hops, and whatever is in the same predicament cannot be a valid modus, for want of a sufficient duration (p).

But to a bill for tithes in kind of certain farms within the parish of K. the defendants as to those farms set up the following moduses; as to two of the farms, a modus of ten fleeces of wool, and two and a half lambs, or one

(1) *Grylman v. Lewes*, Gwill. Carleton v. Brightwell, 2 P. Wms. 165. Cro. Eliz. 446. 462.

(m) Sir Charles Morrifon's case, *ibid.* (p) Watf. C. L. 408. See Chapman v. Smith, Gwill. 847.

(n) *Torriano v. Legge*, Gwill. 2 Vef. 506. Brinklow v. Edmunds, Gwill. 712. Sup. 146. 909.

(o) *Gibf*, 675. Cro. Eliz. 139.

shilling and fixpence in money in lieu of the half lamb, in full discharge of all tithes whatsoever; as to two other farms, a modus of six fleeces of wool, and three lambs for all small tithes; and as to a fifth farm, a modus of eight fleeces of wool, and four shillings in money in discharge of all tithes whatsoever for that farm. As to the first, and second modulus, Price and Bury barons were of opinion they were bad. Ward chief baron, and Smith baron, on the contrary held, that they were valid, for that they were not in discharge of wool and lamb only, and that any thing of a tithable nature may be given in discharge of tithes, as well as money; that the distinction is, where it is in discharge of a species of tithes, and where of the land; that it is clear, that the payment of tithe of one kind could not be a discharge in respect to the tithe of another kind; but they observed, that this was not a payment of tithe, because it was to be paid in all events, whether there were sheep, or not. In respect to the last modus, it was holden good by the chief baron and two of the barons, the third dissentient (g).

Lastly, The modus must not be too large, or, as it is styled, a rank modus; for in these instances of custom, or prescription, the law supposes, as I have already intimated, an original real composition to have been regularly entered into; but having been lost by lapse of time, immemorial usage is admitted as evidence of its having formerly existed, and that from such composition such usage was derived. Now the commencement of time of memory, as above stated, hath been long fixed from the time of the expedition of king Richard the first to the holy land. Any custom may, therefore, be destroyed by proof of its non-existence in any part of the long period from that time to the present, consequently, as this

(g) Archbishop of York v. Duke of Newcastle, Gwill. 583.

real

real composition is supposed to be a fair and reasonable contract, amounting to the full value of the tithes at the time of making it, if the modus insisted on be so rank, and large as palpably to exceed the value of the tithes as it existed at the time of Richard the first, it destroys itself; for as it would be disallowed on direct proof of its non-existence, at any time subsequent to that æra, it is of necessity avoided by such internal evidence of a much later origin (*r*).

The rankness, therefore, of a modus depends on the history of money, and involves in it a question of fact, and not of law; a question nevertheless, which hath frequently been decided by a court of equity without the intervention of a jury: for if a modus be palpably and notoriously of that description, and bears strong intrinsic evidence against the possibility of its immemorial existence (*s*), it were nugatory, and indeed oppressive for the court to direct an issue to try a fact, of which it is perfectly satisfied (*t*). Thus in a case, in which the defendants insisted on several moduses for all small tithes arising out of their respective farms, it appearing upon the face of their answer, that their small tithes in kind, in the year demanded by the bill, did not amount to more in that year, than the alleged moduses, they were at the hearing set aside (*u*).

So Lord Hardwicke C. on a similar occasion declared, that he should be ashamed to send a modus of thirty

(*r*) 2 Bl. Com. 30, 31. See 1192. *vid.* Ashby v. Power, Gwill. 807, 808. 1238. O'Connor v. Cook, 6 Vef.

(*s*) Pike v. Dowling, Gwill. jun. 665.

1166. 2 Bl. Rep. 1257.

(*u*) Lloyd v. Small, Gwill.

(*t*) Bishop v. Chichester, Gwill. 619. 3 Burn Ecc. 1. 425,

1320. Bedford v. Sambell, Gwill. 426.

1058. Twells v. Welby, Gwill.

pounds

pounds per annum to be tried by a jury, where the real value of the tithes was not above sixty pounds, and decreed for the plaintiff, the parson, with costs (*w*).

But the doctrine that the court is bound to take cognizance of the rankness of a modus, and ought in the first instance to overrule it, has prevailed principally with reference to the value of particular things, for which the modus has been set up; as where a specific sum of money is payable for a sheep, or lamb, or any particular species of produce, the present value of which may be easily ascertained; such modulus are distinguishable from those, the validity of which depends on the value of lands, a more complicated consideration varying by different means, by the fluctuations of traffic, and commerce, by improvements in the modes of cultivating lands, by their accidental rise, or depreciation, and by a variety of other circumstances, which render such modulus more uncertain, and consequently more fit subjects for the investigation of a jury (*). So in the case of a farm modus, Macdonald, C. B. recognised the distinction between a farm payment, and one for a particular species of produce, and his lordship observed that in the former, many reasons may have prevented tithes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman, or he may have wished to pay for an exemption from tithes for the sake of improvements. That it is, moreover, scarcely possible to ascertain the comparative value of the land, or of the produce in former times, and the court should not be nice in judging of the value, or of the goodness of the bargain, where by any probable circumstances the modus may have been a real agreement between the parties be-

(*w*) Moore v. Beckford, cited
2 Bl. Rep. 1257,

(*) Chapman v. Smith, Gwill:
847. 2 Vef. 506.

foretime of memory ; more especially ought the court to be extremely cautious in deciding such a question without the intervention of a jury, if the least doubt arise as to the fact of rankness ; under these circumstances, the court would not decree for the plaintiff against the modus ; but held that, if the rector desired an issue, undoubtedly he must have it (y).

And in a recent case, where a modus for certain lands was insisted on, amounting to one shilling an acre, and it was objected to on the ground of its rankness, which it was urged was so evident that if the court sent it to a jury, the principle would be universally established, that the court can in no case decide without an issue: it was further argued, that from acts of parliament, and many other documents of which the courts can take notice judicially, they can judge of the rankness, and where it is most clearly apparent, may determine upon it ; that in the fourteenth century, the statute of Edward III., and other statutes fix the average price of the quarter of wheat at six shillings and eight-pence ; but that carrying it three hundred years farther back it will be found, that the quarter of wheat was at two shillings only, which would make the modus in question much exceed the value of the land ; yet, Lord Eldon, C. directed an issue, observing, that though undoubtedly, according to the constitution of the court, it might take to itself the decision of every fact put in issue upon the record, yet as to immemorial payment, if any reasonable doubt has been raised upon it in the evidence, courts have of late judged it more discreet to send the question of fact to a jury, and will not suppose that there is any prejudice in a tribunal

(y) *Atkyns v. Lord Wil.* P. C. 214. See also *O'Connor loughby de Brooke, Gwill.* 1412. *v. Cook.* 6 Vef. jun. 665.
See also *Pole v. Gardiner.* 1 Bro.

appointed

appointed according to the constitution of the country to try the fact. Rankness is merely evidence against the payment having been immemorial, and forms no legal objection to the modus. If it can be inferred that it has existed, the inequality of the payment cannot impeach it; and therefore the judges in the case in *Blackstone* certified, that two shillings and sixpence was not an illegal payment for a lamb. That there is an evident distinction in respect to rankness between a modus for tithe of particular things, and a farm modus; for that it is perfectly easy, in almost every period of our history, to ascertain what, for instance, a lamb was worth, and therefore to conjecture upon what, in any place, parties would agree. But what is the value of land in a particular parish, and what therefore it is proper to give per acre, is a very complicated consideration. That though the court cannot but entertain a strong opinion, that one shilling an acre was, on the principle of rankness, in all probability a monstrous payment, yet still the judges have thought, that even such payments ought to go to trial, and verdicts under which, in many cases, even more than one shilling an acre has been claimed, have been confirmed. That the modus in question is nothing more than one shilling an acre for all tithes of the farm, in whatever form cultivated, or occupied, not for agistment, milk, lamb, or any other particular tithe. That there was no evidence before the court shewing, that this modus may not be proved to be as reasonable a commutation for tithes, even put so distributively, and not as a farm modus, as in some of those cases, where one shilling an acre has been given, even for tithe of hay alone (z).

(z) *O'Connor v. Cook*. 6 Vef. jun. 665. & 8 Vef. jun. 535. A new trial, on the grounds of misdirection of the judge, and new evidence since discovered. A new verdict was found for the plaintiff in the issue, the defendant in equity, establishing the modus; and a new trial was granted, on which there was again a verdict for the plaintiff. motion was afterwards made for a See also 9 Vef. jun. 168.

To illustrate this species of objection to a *modus*, it will be proper to specify various instances, in which it hath been allowed to prevail, or has been overruled.

A *modus* of five shillings an acre for wheat and rye; four shillings an acre for summer corn; three shillings an acre for meadow; twenty-four shillings a year payable in lieu of the tithes, of a whole farm; five shillings an acre for wheat; two shillings and sixpence for other grain; two shillings and sixpence for meadows mowed; one shilling and fourpence for upland grass grounds; and two shillings and sixpence for every farrow of pigs (*a*); a *modus* of two shillings an acre, in lieu of the tithe of all grain reaped from the enclosed arable land in a hamlet; and one shilling and sixpence an acre, on the common field arable lands (*b*); a *modus* of four pounds ten shillings a year for a farm of the yearly value of thirty pounds (*c*); one shilling an acre for hay (*d*); four shillings for every acre of wheat; and two shillings for every acre of lent corn reaped (*e*); a *modus* of two shillings and sixpence an acre for corn lands (*f*); four shillings for every ten lambs fattened; two shillings for every five; fourpence a piece for all *under* five, and for all *above* five, and under ten, fourpence a piece on the shearing-day; and threepence a piece for all other lambs bred in the parish in lieu of the tithes of

(*a*) *Torriano v. Legge* Gwill. 909, 910. *notis. & 1 Bl. Rep.* 645. *Bunb.* 125.

420.

(*c*) *Hulse v. Munk*, Gwill

(*b*) *Gale v. Carpenter*, Gwill. 960.

945.

(*f*) *Bishop v. Chichester*, Gwill.

(*c*) *Kennedy v. Goodwin*, 1323.

Gwill. 708. *Bunb.* 301.

fuch

such lambs (*g*); twelve pence for a milch-cow, and six-pence for every calf killed and sold (*g*); threepence for every lamb yeaned within the parish (*h*) have been all adjudged to be rank, and consequently void. So a modus of forty-eight pounds a year, in lieu of all tithes of a manor worth only eighty pounds a year, was held rank, since according to the natural improvement of land, from the time of king Henry the eighth, it ought to have been ten times as much, on account of money sinking in its value, and lands rising in theirs (*i*).

The principle of these decisions is this: that the value of money being much higher at the time when all moduses are presumed to have commenced, than it is at present, a modus approaching to the value of the tithes at this day, must at that period have greatly exceeded it; and it were absurd to suppose, that the parishioners would at any time have agreed to a substitution for these articles, so much more valuable than the articles themselves.

On the other hand, a modus that every occupier of lands within the parish having a lamb yeaned within the same, ought to pay to the rector, or his lessee, for every lamb so yeaned, the sum of threepence and no more, in satisfaction of the tithe of every such lamb, and that the same was payable yearly on St. Mark's-day, or so soon after as demanded; was objected to, as a rank modus, on the ground, that in ancient times, and long within the time of legal memory the price of cattle, and other commodities,

(*g*) Wood v. Harrison, Gwill. 631. Bunb. 105. & vid. Bishop v. Chichester, Gwill. 1320.

970. Franklyn v. The Master and Brethren of St. Cross, Gwill. (i) Ekin v. Pigot, Gwill. 783. 629. Bunb. 78. 3 Atk. 298.

(*h*) Goddard v. Keble, Gwill.

was so much lower than at present, that a lamb which now may be worth two shillings and sixpence, two hundred years ago, would not have been worth more than sixpence, or in such proportion, that the sum of threepence insisted on to have been anciently and immemorially paid in lieu of every lamb, which sets the price of every lamb at two shillings and sixpence, is so near the value of such tithes, even at this day, that it proved itself to be a modern composition only; the court of exchequer, nevertheless, was of opinion, that the objection arising upon a matter of fact was very proper to be considered by a jury, who would enquire into the value of lambs in the place where this controversy arose: and the court pronounced a decree to that effect, which on an appeal was affirmed by the house of lords (*k*). So a modus of nine-pence an acre of marsh land, except when sown with corn, or planted with hops, was sent by the lord Chancellor to be tried at law (*l*).

In respect to such moduses as have been adjudged valid, they are of the following description: Sixpence for every cow depastured within the parish, payable at Michaelmas, in lieu of tithes of milk and calves; twopence for every lamb yeaned within the parish, in lieu of tithe thereof; one penny for every fleece of wool shorn from every sheep fed and depastured in such parish, in lieu of the tithe of such wool; twopence for every colt foaled; fourpence for every garden, in lieu of garden stuff; fourpence for potatoes tilled in a ridge in the field for family use, and not for sale; pigs, and geese in kind, except under ten, and then one-penny a pig, and one penny halfpenny a goose (*m*);

(*k*) Webb v. Giffard, Gwill. 847. 2 Vef. 506.
708. and 4 Bro. P. C. 212.

(*m*) Boscawen v. Roberts,

(*l*) Chapman v. Smith, Gwill. 946.

a modus of one halfpenny for the wool of each sheep dying (*n*); fourpence a month for the tithe of wool of each sheep shorn in the parish (*o*); a modus of a garden-penny yearly, for all vegetables and fruit, except apples and pears (*p*); a modus of a garden penny for the produce of the garden generally (*q*); twopence for every new milch cow, and one penny halfpenny for every old milch cow fed in the common fields, in lieu of the tithe milk of the same (*r*); one penny for every lamb, eightpence a score for sheep wintered in other parishes in lieu of tithe of wool (*s*); one penny for all tithe-wood cut on the common and burnt in the family (*t*); one penny halfpenny for every calf yeaned (*u*); a modus of eightpence for every cow, and fourpence for every heifer, in lieu of the tithe of milk and calves of such cow and heifer (*v*); three shillings and fourpence payable for every score of sheep shorn out of the parish, and so proportionally for a less number than twenty, or for a less time than a year, for the wool and lamb of such sheep (*w*); a modus of one shilling for each day's math (*x*); a modus of nine carts of logwood, or an hoghead of cyder (*y*) in lieu of all tithes (*z*); twelve-pence an acre for low meadows, and eightpence an acre for high meadows in lieu of tithe hay (*a*); a modus of one penny at Easter annu-

(*n*) Brinklow v. Edmunds,
Gwill 711. Bunb. 307.

(*o*) Ibid.

(*p*) Thompson v. Holt, Gwill.
671.

(*q*) Phillips v. Symes, Gwill.
654. Bunb. 171.

(*r*) Thompson v. Holt, Gwill.
671.

(*s*) Ibid.

(*t*) Ibid. 711.

(*u*) Thompson v. Holt, Gwill.
671.

(*v*) Ibid.

(*w*) Ibid.

(*x*) Markham v. Huxley,
Gwill. 1499.

(*y*) Woolferston v. Mainwaring

Gwill. 679. Bunb. 279.

(*z*) Ibid.

(*a*) Pole v. Gardiner, Gwill.
601.

ally

ally, in lieu of the tithe hay growing on the premises (*b*); a modus of twenty-six shillings and eightpence for hay small tithes and Easter offerings (*c*); a modus of eight pounds for a farm of eighty pounds a year (*d*); one penny per head for sheep brought into the parish after Candlemas, and clipt in the parish in lieu of tithe-wool (*e*); threepence per head for sheep brought into the parish before Candlemas, and carried out before shearing time, as an average payment for the wool carried out (*f*), and such payment may be applicable to the wool tithe, although not then due (*g*); a modus to pay a hearth-penny for all combustible wood (*h*); a modus for a lord of a manor to pay six pounds in satisfaction of all tithes in the manor, and in consideration of such payment to take the tenth flock, &c (*i*); a modus for persons occupying lands in the parish, but residing out of it, to pay fourpence an acre for the tithe of hay, and the herbage of pasture lands occupied by them in the parish (*k*).

Such is the general nature of a modus; and such are the properties which are necessary to constitute its validity.

But notwithstanding these requisites are indispensable, and the rights of the church shall not be impaired by any customary payments, unless sanctioned by the rules of law (*l*), a modus being presumed to be a composition

(*b*) *Finch v. Masters*, Gwill. 652. Bunb. 161.

(*c*) *Ibid.*

(*d*) *Edge v. Oglander*, Gwill. 536 Bunb. 301.

(*e*) *Ellis v. Saul*, Gwill. 1326. 1334. 1 Anstr. Rep. 332.

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) *Green v. Hun*, Gwill. 215. Cro. El. 702.

(*i*) *Pigot v. Heron*, Gwill. 200. 2 Moore, 483.

(*k*) *Chapman v. Bishop of Lincoln*, Gwill. 675. Mos. Rep. 266. 279.

(*l*) 2 Ves. 506.

in writing with the consent of the parson, patron, and ordinary before time of memory, decayed indeed, or lost by accident, yet having grown into a prescription shall be allowed, though it may not, in every respect, appear a wise provision for the interests of the parties : It shall not be narrowly and strictly canvassed, the courts on principles of public policy being averse from intrenching upon such ancient usages for slight reasons : purchasers buy lands upon the faith of such moduses, and are induced to give a greater or less price for the lands, according to the nature and value of the modus, by which they are covered. The vendor proceeds upon the same confidence ; the parson accepts his living with the expectation of these payments ; and in contemplation of them the lay impropriator purchases : it would, therefore, be unreasonable to overturn moduses upon trivial grounds, and by these means to deceive purchasers, who bought the land with a view of paying no more than the modus, and to give the lay impropriator an undue advantage by suffering him to take the tithes in specie, for which he never stipulated (*m*) : Thus, although ordinarily the occupier of lands be answerable for the payment, yet a modus payable by the owner of the lands is valid : As where to such a modus it was objected, that it was unreasonable, inasmuch as the parson was under the necessity of seeking for the party to pay him his modus, instead of claiming from the tenant either the modus, or tithes in kind ; yet the court held that this might be a fair agreement at the time of the commencement before memory, when the ownership of land was not subject to such fluctuation as it is at present, and that the parson might have thought it more advantageous to have the landlord a security rather than a tenant

(*m*) *Hardcastle v. Sclater*, Gwill. 788.

in doubtful circumstances, and that the court ought not nicely to weigh the validity of that judgment (*n*). So a modus that the occupiers of lands, and tenements within certain villis within the parish of C. not being parcel of the demesnes or granges of the monastery of C., shall pay several sums; that is, so much in certain for each vill in lieu and satisfaction of tithes of hay growing within the villis, it was insisted, that this modus was void upon the face of it; for that it was unreasonable that any one occupier should be liable for all the tithes of all the rest, and that it also was uncertain who was the person to pay, for there might be several occupiers in one year: but the court decided this to be a good modus, since it must be presumed, that at the time of entering into this agreement, one person was owner of a whole vill, and that consequently by the branching it out afterwards, and dividing it into several, the parties could not destroy that modus, which was originally and in its commencement good. Nor does it seem necessary, that the parson should make every one of the occupiers a party to a suit for this modus, because as it affects all the lands, each occupier is liable for the whole, and they are entitled to a contribution among themselves (*o*). So where there was a waste between two villis, N. S. and S. S., and the residents and occupants of each vill have had common by reason of vicinage, a custom; that if any inhabitant of S. S. have any pasture ground in N. S. for cattle, which go on the waste, then he shall pay tithes to the parson of S. S. where he inhabits, and that in consideration thereof, the rector of S. S. shall pay to the parson of N. S. four shillings, and to the vicar eight shillings; and that the party inhabiting within his parish shall be discharged of tithes against the parson of N. S.;

(*n*) Ord. v. Clarke, Gwill.
1437. Anstr. 638.

(*o*) Hardcastle v. Sclater,
Gwill. 784.

though it was objected that it was not equal, it being unreasonable, that the parson of S. S. should have all the tithes of lands of N. S. paying to the parson four shillings per annum, and that the parson of N. S. should not have the same privileges in the lands of S. S., and that by law no parson is to have tithes, but of lands in his own parish; yet it was held, that though the custom were hard, yet being found by the verdict the court could not interfere; that there was a recompence, such as it was, given to the parson of N. S., and though not given by the parties themselves, yet it was given by the parson of S. S., which is in effect the same (*p*).

On the other hand, where a modus was insisted on of one penny payable to the rector annually at Easter by the owners, and occupiers of ancient tenements having right of common on S. common, in respect to which ancient tenements the lands occupied by the defendant were set out, or allotted as a modus for the tithes of grafs arising either on the ancient estate, or common in right thereof, whether such common should be divided, or allotted, or permitted to continue undivided or unallotted, and whether the grafs be cut and made into hay, or whether it be eaten by barren or unprofitable cattle; the modus was held to be void upon the face of it; the court observing, that it did not appear that any agreement was made with the rector, at the time of the inclosure, respecting the payment of any modus for tithes, or for saving the rights of the owners of the farms over the lands when they should be inclosed, and that without some agreement it might be a question, whether the modus was not extinguished by the inclosure? But supposing that by usage antecedent to the inclosure, a modus of one penny had

(*p*) *Hickes v. Froud*, Gwill. 267.

been

been paid for the farms and the commons, it could not have been paid for hay on the commons, for the commons from the nature of them, and of the rights over them, could not have produced hay. Such a usage could not have afforded a presumption of any ancient agreement on the part of the rector to receive, and on the part of the owners of the farms, to pay an annual sum in lieu of the tithe of a tithable matter, which at the time of making it could not have been in the contemplation of either of the parties, as the subject of their agreement, and over which one of the parties had no right. For supposing the ancient rights of the owners of the farms to have continued after the inclosure, yet the right of the owners of the farms could not before the inclosure be extended to any exemption from payment of tithe of hay, because if hay had been produced on any part of the common, it would not have belonged to the owners of the farms, who paid the modus, but to the owner of the land on which it grew, who was the lord of the waste (*q*).

A parochial modus may extend to lands recently inclosed, but it is otherwise with regard to a farm modus (*r*).

It remains now to be considered how a modus may be discharged, and tithes may become due and payable in kind.

A modus may be discharged by the destruction, or alteration of the subject, for which the modus was payable; as where the prescription is for hay and grafs of any par-

(*q*) *Scott v. Fenwick*, Gwill.
1250.

(*r*) *Bishop v. Chichester*, Gwill.
1323.

ticular quantity of land, if the land be converted into a hop garden, or tillage, the prescription is gone (*s*). Thus, as I have had occasion in a former part of this work to state (*t*), a modus for a mill, when it was partly a corn mill, and partly a fulling-mill, in consequence of the fulling wheels being taken away and two mill-stones substituted in their room, was held to be discharged, on the ground that what had been done was equivalent to the erection of two new corn-mills (*u*). So if an ancient mill under a building worked with one wheel, and the owner, under the same roof, erect two new wheels, and two new stones, this constitutes it in all respects two mills, and he cannot cover them by the same modus; he might as well erect another mill on the same stream, and call it two mills. The principle upon which it is decided that a modus is destroyed where two stones are erected instead of one, is, because the miller is thus enabled to grind a double quantity (*v*). So where a water course was altered by the owner of a mill, and the mill pulled down by him, and rebuilt upon it, it was adjudged that the modus was extinguished (*w*). So where there is a prescription to be discharged of all tithes by delivering deer out of a park annually, and the park is disparked, the prescription is destroyed (*x*). But where a mill had originally only two pair of stones, and a third pair had been added, the whole being carried by the original

(*s*) 2 Inst. 490. 1 Roll. Abr. 908. & supra, 153. But see Cowper v. Andrews, Gwill. 275. 651.

(*t*) Supra. 47.

(*u*) Talbot v. May, Gwill. 782. 3 Atk. 17.

(*v*) Ibid.

(*w*) 1 Roll. Abr. 652.

(*x*) Hutton 58. See Gwill.

Moore, 683, in which the question was, whether a modus for a park of 2s. a year, and a shoulder of every third deer killed in it, was determined by disparking, on which the court were equally divided.

frame and wheels, and the mill being incapable of working more than two pair of stones at one time; a modus for the mill was nevertheless established (*y*). So if the modus cover the land, and the mill is merely an accidental quality, the destruction or alteration of the mill does not amount to a discharge of the modus (*z*). In like manner, where a party was seised of lands, for the tithes of which he had immemorially paid five shillings and fourpence, and he built a corn-mill upon the same, it was adjudged he should pay no tithes for the corn-mill, because the lands were discharged from the modus (*a*). So where there was a modus for lands contained in a park, which belonged to one person originally, and was afterwards disparked, and divided out among several persons, that was held not to destroy the modus, for the prescription went to the land, and not to the park; consequently, as it was a modus in respect of the land, it was not destroyed by dividing the land (*b*). So where forty-eight acres of common lands were subject to a modus, and an agreement was entered into between the defendant and the parson, and those who had a right to feed upon the common, to make an inclosure, and an act of parliament was passed for that purpose, by which it was provided, that they should enjoy all their rights in severalty, as they did the right of common before; these forty-eight acres being allotted to the defendant in lieu of common, they were held to be still covered by the modus; for although the recital in the act used only general words, yet it shewed plainly the intention of the legislature to have been, that every person should enjoy his

(*y*) *Goodwin v. Wortley*, 782. 3 Atk. 17.

Will. 715.

(*a*) 1 Roll. Abr. 652.

(*z*) *Talbot v. May*, Gwill.

(*b*) See Gwill. 786.

allotment, as before in, the same way as he did the subject, in lieu of tithes, and that was liable to the *modus* (c).

But in a case, in which the owners of a certain demesne claimed the benefit of a *modus* in lieu of tithe of corn, grain, and hay, and by an act of parliament a common was inclosed, and ninety acres allotted to the owners of that demesne, a clause in the act that the divided lands before parcel of the common, should be holden by each person, to whom the respective divisions were allotted, subject to the same charges and incumbrances as their own former land, to which they are allotted, and consolated, were before subject; and also a clause that the act should be construed beneficially to the land owners, to whom the respective divisions were allotted, were held not to extend the *modus* to the allotted lands; the court being of opinion, that this case was clearly distinguishable from the case I have just cited, since the demand of the impropiator in the principal case, was of the tithe of corn, grain, and hay. But corn, grain, and hay could not be part of what grew on a common; the tithes, that arose upon the common, could only have been tithes of agistment, or of lambs, calves, wool, milk, and other species of tithes, which could have been the produce of a common, that therefore, the exemption could not relate to any other but such specific tithes, and was not comprehended within the substantial idea of a *modus* or compensation insisted on by way of exemption from payment of tithes, for those lands, which were part of the common, but which then produced corn, grain, and hay; for the rector could have no benefit from this *modus*, which was confined to the tithe of corn, grain, and hay, in respect of any species

(c) *Stockell v. Terry*, Gwill. 823. 1 Vef. 115.

of tithe which could arise from the common, while it remained common. In short, that the decision in this case rested on the same principle as the decree in the case last cited, that what was before exempted should continue exempted, and what was before not exempted should pay tithe (*d*).

Nor does unity of possession destroy a modus; thus in a case, in which a prescription was alleged, that the queen and all those whose estate she hath, had used to pay to the rector of Kingswood two shillings and fourpence yearly, in satisfaction of all the tithes of certain land in Kingswood; and it appeared in evidence, that the queen had the estate of the abbot of Kingswood, who was owner of the land, and rector in fee in right of his abbey, whence it was inferred that the prescription was void; inasmuch as the abbot could not pay himself, nor could the queen, who has now the estate of the abbot; but that the prescription ought to have been stated, that when the queen demised the land, the occupier had used to pay the modus; the court were clearly of opinion, that unity of possession is not a perpetual discharge of the tithes, nor of the recompence in lieu of them, and consequently that the retainer might be regarded in the light of a payment to himself (*e*).

The next species of partial exemptions to be considered are compositions real,

A real composition is when an agreement is made between the owners of land, and the parson or vicar, with the consent of the patron and ordinary, that such lands shall be exempt from the payment of tithes, in considera-

(*d*) *Moncafter v. Watfon*,
Gwill. 905. 3 Burr. 1375.

(*e*) *Chambers v. Hanbury*,
Gwill. 208. Moore 527.

tion of some land, or real recompence allotted to the parson in lieu, and satisfaction of them: It does not mean every substantial permanent security for the payment of the composition; but land substituted in lieu of tithes, or a rent charge issuing out of land (*f*); or a composition of an annual sum out of the profits of a manor; for though in the last instance, it was insisted, that the composition was void upon the face of it, since the payment was not to arise from the manor or park, but from the profits of the manor, and that eventually there might be no profits, and the composition was therefore bad in respect to the precariousness of the recompence; yet the court established it (*g*),

This species of agreement was allowed by the law on the principle, that the clergy were not likely to be prejudiced by such composition, since the consent of the ordinary, whose duty it is to guard the rights of the church in general, and of the patron, whose interest it is to protect that particular church, were both made essential to the validity of such composition; but experience having shewn that these precautions were insufficient, and the possessions of the church being by means of such agreements frequently impaired, the disabling statute of the 13th of Eliz. c. 10. referred to in the commencement of this work, was passed, which prohibits among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years. So that now by virtue of this statute no real composition made since the 13th of Eliz. is good for any longer term than three lives, or

(*f*) *Attorney General v. Bowles*, Gwill. 109. 3 Atk. 809. (*g*) *Sawbridge v. Benton*, Gwill. 1397. 2 Anstr. 372.

twenty-one years, though made by consent of the patron, and ordinary. Thus the mischief has been effectually obviated, such compositions being now rarely heard of, unless by authority of parliament (*b*).

The distinction between a *modus*, and composition real is clearly settled. A *modus* must be taken to have immemorially existed, and it requires no other evidence to prove it than immemorial usage: a composition real must have commenced within time of memory, and its commencement must be proved, for otherwise every bad *modus* would be set up as a real composition; but to establish such composition real it is not requisite, that the deed, by which it was created, should be shewn; for that purpose, it is sufficient to adduce evidence, from which it may be inferred that such deed did once exist, and by which the court is warranted in presuming, that such composition took place, upon a solid and legal foundation: thus the consent of the ordinary to the composition real, shall be presumed from length of time, and where it appeared, that king Edward the third entered into a composition real, as owner of the land, and as patron of the church, it was held, that he might also be presumed to have acted on that occasion, as supreme ordinary. After an acquiescence in such agreement by successive incumbents during a long period of time, it appears by a series of authorities, that the courts are averse from disturb-

(*b*) 2 Bl. Com. 28. 2 Wooddef. Bowles, 3 Atk. 809. & Gwill. 106. Gwill. 591. Ekins v. Dor- 109. Deg. p. 11. c. 20. 2 Bos. mer, Gwill. 800. 3 Atk. 534. and Pull. 206.
See also Attorney General v.

ing the quiet of a parish, and lean to the presumption, that in the transaction *omnia solemniter fuisse acta* (i).

An agreement by the parson, patron, and ordinary confirmed and established by a decree in equity, since the statute of the 13th of Eliz., though some centuries ago deemed binding (k), it is now settled, can bind only the parties to the same, because property can be affected only by the law of the land. Thus to an information brought by the Attorney General, at the relation of Dr. Blair the rector, for an account and payment of tithes in kind, the defence set up was, first, an agreement entered into in the year 1664, between a former rector, and the owner of the lands in the parish, for accepting a yearly sum of eighty pounds in lieu of tithe; and farther, a decree was insisted on, which appeared to have been pronounced in 1677 between the same parties, with the exception of the bishop, who was no party to the agreement. It was also urged, that a court of equity could not relieve; and lastly, the length of time was objected to, as a bar to the plaintiff's demand. But lord Northington C. was of opinion, that the agreement was on the face of it unequal in respect of the consideration stipulated to be paid to the rector, for it appeared, that the agreement was entered into in order to effectuate an inclosure of the open fields in the parish; and that no consideration was allowed in respect of the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit, and which was always allowed in every private bill for an

(i) *Heathcote v. Mainwaring*, See also *Gwill. 689*, and *Robinson v. Appleton*, 1101. *Ibid.* and *Gwill. 1345*. 3 Bro. Ch. Rep. 217. *Sawbridge v. Benton*, *Gwill. 587*. 2 Anstr 372. *Benson v. Watkins*, *Gwill. 612*. *Bunb. 10*. (k) See *O'Connor v. Cook*, *Franklin v. Holmes*, *Gwill. 1229*. 8 Vef. jun. 537.

inclosure,

inclosure. That even if the agreement were equal, it would not bind the successor in the rectory, but would be void as against him. That as to the decree, it appeared to have been made in a cause by consent between the same parties, except the bishop of the diocese, a mere formal party. That the parties themselves did not consider the agreement as binding on the rector; for they regarded the annuity of eighty pounds as not being an adequate consideration for the rector's having relinquished his tithes in kind, and therefore, they entered into a new agreement, by which they contracted to allow him the additional sum of sixteen pounds eight shillings and seven-pence per annum; and on being allowed that addition, the rector by his answer consented to have the agreement established; and although the decree founded on the agreement in terms bound the successors in the rectory, yet it was in a cause by consent, and could have no such operation; and as to the cases cited to a different effect, his lordship disallowed their authority. That the agreement, and decree being laid out of the case, a court of equity might give relief: *Equitas sequitur legem*. That it is a fixed rule at law, that no prescription can run against the church, and that length of time ought in this case to be no bar. But the court added, that if the parties had made an allowance for the future improved value of the tithes, the rector might have been left to his legal remedy; an account of the value of the tithes which had accrued from the time of filing the information was decreed, and that the balance of such accounts should be paid to the relator; and the decree was affirmed on appeal by the house of lords (1).

(1) Attorney General & Blair 2 Wooddef. Lect. 107. Jones v. v. Cholmley, Gwill. 914. Ambler. Snow, Gwill. 1199. Cuthbert v. 510. 4 Bro. P. C. 332. And Westwood, Gwill. 666. Gilb. Eq. Cartwright v. Cotton, in the Ex. Rep. 230. chequer, 24th of April 1779. S. P.

There are also other species of composition than compositions real. Thus a composition to have a cow, and a certain number of other beasts fed in a wood in lieu of tithes of pannage, is good (*m*). So in an action of trover for a lamb, and a sheaf of wheat, a special verdict was found, that between the years 1216 and 1261, there was a composition between the abbot and convent of the abbey of *Fountains* of the Cistercian order, and the prebendary of Studley, of which prebendary the abbot and convent were seised, that the abbot and convent should be forever free from the payment of tithes of their lands which they tilled with their own hands, within a certain grange, within the prebend, and that they should pay tithes for all lands without the grange, and that the abbot and convent should pay annually to the prebendary and his successors five marks. It was further found, that in the year 1359, there was another composition, reciting the former; but it was not found, that this was confirmed by the patron and ordinary, by which the prebendary and his successors were to have their election yearly either to receive tithes in kind of corn and grain arising within the places aforesaid, as well of lands in the hands of the abbot and convent, as in the hands and manurance of their tenants, or to receive five marks, so as such election were notified to the abbot; and for those years, in which the prebendary should choose to receive tithes, the five marks were not to be paid. It was then found, that the possessions of the abbey came to the crown by statute 31st Hen. 8., and that at the time when the action was commenced, the defendants were proprietors of the lands, and that the plaintiff was seised in fee of the prebend, and that a lamb and sheaf were then renovant upon the lands. The court of Exchequer held that the second composition did not affect the successors of the prebendary, and that,

(*m*) Gwill. 116.

therefore,

therefore, the abbot was not bound by it; that the power of election was gone, and consequently the first composition should stand *quoad terras in propriis manibus*; and that for the others, tithes in kind might be taken as before (n).

Farther, in a case, in which the lessee of tithes agreed with the owner of lands for certain collateral considerations not to take tithes in kind from the tenants for twelve years, but to accept a reasonable composition not exceeding three shillings and sixpence per acre, and there-to bound himself and his assigns, this agreement was held void, from the uncertainty of the sum to be paid; and the underlessee who sued the tenant of the land for tithes in kind, obtained a decree in his favour (o).

Nor is it necessary that the composition should be in writing; but a parol agreement for that purpose shall be allowed to operate. Thus to a bill by the lessee of the rector for tithes in kind, the defendants pleaded a verbal agreement between them and the rector, that they should retain their tithes for three years, paying a certain sum of money; and a question was raised, whether the above agreement was binding upon the rector and the plaintiff, and the court declared the agreement to be valid (p). But it is clear that where there is a composition between the parson and the occupiers, and the money paid and accepted during the incumbent's life; yet, upon his death, the successor may sue for the tithes in kind, without notice that he refuses the composition, because it determined

(n) *Ingleby v. Wyvell*, Gwill.
516. Hard. 381.

(p) *Keddington v. Adamson*,
Gwill. 611. See *vid.* S. C. in *not.*

(o) *Brewer v. Hill*, Gwill. *ibid.*
1418. Anstr. 413.

by the death of the incumbent who made it, and the successor may continue, or wave it at his election (q); and even an agreement by deed between the vicar and the patron, with the consent of the ordinary, and the inhabitants of a vill within the parish, to pay six pounds in lieu of all tithes arising within the vill acquiesced in for a hundred years was held not to be binding on the successor of the vicar (r). Such also was the decision in regard to an agreement for the acceptance of land in lieu of tithes, entered into subsequently to the statute 13th Eliz. though sanctioned by the concurrence of all parties interested, and confirmed by a decree in equity (s). But if upon coming to the living the successor accept the composition, that will amount to a confirmation so far as to oblige him to give notice of his renouncing it, and demanding tithes in kind, before he brings his bill; otherwise the occupier making a tender of the money before the commencement of the suit, and offering by his answer to pay it, shall not be liable to costs; but in most cases will be intitled to his costs from the parson, if he relies on the tender for his defence (t).

If the vicar shew a composition that the parson used only to have the tithe of corn, the vicar shall have the tithes of rape seed, hops, and other tithes comparatively of modern introduction into this country (u).

In case a bill be filed for a composition for so much in the pound according to the rent of the land, the account

(q) *Brown v. Barlow*, Gwill. 1199.

1801.

(s) *Brown v. Barlow*, Gwill.

(r) *Lloyd v. Mortimer*, Gwill. 1001.

1090.

(u) *Robinson v. Brooke*,

(t) *Joze v. Snow*, Gwill. 471.

is consequential to the discovery, as well as in the case of suing for tithes in kind; though it was objected on the part of the defendant, that the discovery once obtained, it was a question solely at law, and the subject of an action of assumpsit (*x*).

With respect to notice of the determination of a composition, such notice must be given by analogy to the notice given in a holding of land, and is regulated in the same manner as between landlord and tenant, from year to year; for the composition with the occupier is similar to a lease to a stranger; therefore, if a composition for tithes be made by A. as proprietor, and he grants a lease of them to B. whose interest is afterwards determined before any alteration is made in the composition, A. cannot determine it without giving six months notice (*y*). And upon this principle in the Kensington case above referred to, it was expressly decided by the house of lords, in concurrence with the unanimous opinion of the judges, that a notice given upon the eighth of September to determine a composition from year to year, such year commencing on the twenty-ninth of September, is by no means sufficient to determine such a contract (*z*): Nor if a notice be too late to determine a composition from year to year, will it be sufficient to determine the composition for the succeeding year (*a*). But where a composition is payable at Christmas; notice at any time before Christmas, given expressly for the succeeding year, will be sufficient (*b*).

(*x*) Worrall v. Nicholls, Gwill. 1302.

(*y*) Wyburn v. Tuck, Gwill. 1517. and 1 Bof. & Pull. 458. vid. Reynell v. Rogers, Gwill. 612. Hilton v. Heath, Gwill. 845.

(*z*) Adams v. Waller, Gwill. 1204.

(*a*) Bishop v. Chichester, Gwill. 1321.

(*b*) Glafs v. Caldwell, Gwill. 1030. Vid. Walter v. Flint, Gwill. 985.

It seems competent to a defendant to object to the want of a sufficient notice to determine the composition, though he insist upon it also as a modus (c),

(c) *Bishop v. Chichester*, Gwill. *Willoughby de Brooke*, Gwill. 1322. Sed vid. *Atkyns v. Lord* 1412.

CHAPTER THE NINTH.

Of Tithes in London.

ANTECEDENTLY to the reformation, and the dissolution of monasteries, the maintenance of the secular clergy of the city of London, a subject involved in considerable obscurity, seems to have arisen principally from voluntary oblations, and from personal tithes, which were nearly of the same nature: But certainty in respect to the quantity, value, or specific articles to be offered, not being prescribed by any canon or law, frequent litigations arose between the clergy, and the citizens, and inhabitants, relative to such payments; the progress of which is minutely traced by Dr. Burn; but it is altogether unnecessary and uninteresting to enter into any detail of these disputes; it is sufficient to observe, that at the period of the reformation the provision for the parochial clergy of London, on whom the functions before exercised by the regular priests had devolved, had become very precarious and inadequate (a).

In order therefore to remedy this deficiency, and to adjust a matter of so great concern, it was submitted to the archbishop of Canterbury, and the lord Chancellor, and other lords of the council; and they made an order for the payment of tithes within the city, according to the rate of two shillings and ninepence in the pound. This order or decree was first promulgated by proclamation, and afterwards established by act of parliament, the 27 Henry the eighth, c. 21. But the same not being altogether complete, a subsequent order or decree was pro-

(a) *Bennett v. Trepas*, Gwill. also *Dunn v. Burrell and Goffe*, 640. 2 Bro. P. C. 437. See Gwill. 299. 13 Ves. jun. 16, 17.

nounced by the lords for the like purpose with some additions, and was confirmed by the statute 37 Henry the eighth, c. 12 (b), by which a proper provision for that learned body was finally ascertained, and regulated, which, after appointing arbitrators, sect. 1. was to the following effect: 2. That the inhabitants of houses and occupiers of shops and other buildings, in the city of London and its liberties, shall pay to the parsons, vicars, and curates after the rate of one shilling and fourpence halfpenny every ten shillings annual rent, and for every twenty shillings annual rent, two shillings and ninepence, and so for above the rent of twenty shillings by the year, ascending from ten shillings to ten shillings, according to the rate aforesaid: 3. That, if any lease of such houses or other buildings shall be made by fraud, reserving less than the accustomed rent, or without any rent reserved upon the same by reason of any fine, or any other fraud, the occupiers shall pay according to the aforesaid rate, on the usual and fair rent before the making of such lease: 4. That owners occupying their own houses, shops, or other buildings, shall pay according to the same rate, on the last rent: 5. That lessees of a house or other building inhabiting part and letting out the residue, shall pay after the same rate according to the quantity of their rent by the year: 6. That where lessees of diverse houses and other buildings shall assign or let out some or one of such buildings, or 7. where a lessee of one house or other building, shall let the whole of such house or building to one or more person or persons the occupiers shall pay according to their respective proportions of the rent: 8. That dwelling-houses converted into warehouses, or warehouses converted into dwelling-houses shall be subject to the same rates: 9. That, where any dyehouse or brewhouse, with implements for dying or brewing, shall be demised with a rent reserved, as well in respect of such implements as

(b) *Bennett v. Trepas, Gill. 643, 644. Deg. p. 2. c. 25.*

of such dyehouse or brewhouse, it shall be subject to the same rate, with the third penny abated : and that a principal house with a quay or wharf having any crane or gibbet shall pay after the like rate, with like abatement : and that wharfs belonging to houses without crane or gibbet, shall pay the same as mansion houses : 10. That where any mansion house, with a shop, stable, warehouse, and other appurtenances, shall have been occupied together, and shall be afterwards severed, each part shall be subject to the same rate according to the several rents reserved : 11. That the tithes shall be payable quarterly at the four most usual feasts of the year : 12. That every householder paying ten shillings rent or above, shall for himself be discharged of his four offering days ; but his wife and family taking the rights of the church at Easter, shall pay twopence for their four offering days yearly : 13. That where a house shall have been let for ten shillings yearly or more, and shall be subdivided into parcels yielding less than ten shillings yearly, the owner or principal lessee shall pay the whole rate, and the under lessees shall be discharged paying twopence yearly for their four offering days : 14. That for such gardens as appertain not to any mansion house, which any person holds for pleasure or his own use, he shall pay no tithes : but if he hold such garden, containing half an acre or more, and shall make any yearly profit thereof by way of sale, he shall pay tithe for the same, after such rate of his rent as first above specified : 15. That if any such garden, then being of the quantity of half an acre or more, be thereafter by fraud divided into less quantities, payment shall be made according to the rate aforesaid : 16. That the houses of the nobility in their own hands, and the halls of companies unletten, which have not in times past been used to pay tithes, shall be exempt : 17. That the same exemption shall extend to sheds, stables, cellars, timber yards, and winter yards, which were never parcel

of any dwelling house, and have not been accustomed to pay tithes: 18. Provided, that where less than the above rate hath been accustomed to be paid for tithes, the accustomed rate shall be continued: 19. That disputes shall be decided by the mayor, by the advice of council, with costs at his discretion and that of his assistants: 20. That if such disputes shall not be so determined within two months, the lord Chancellor, on complaint to him made within three months then next following, shall decide the same with such costs as shall be thought convenient; provided that if any tenement, on account of great ruin or decay, shall be let for less than the usual rent, the occupier shall pay only after the rate of the rent reserved.

In consequence of the fire of London, and its extensive ravages, it became necessary for the legislature again to interpose in respect to tithes payable within the city; and accordingly the tithes of those parishes, the churches of which were by the fire of London either demolished, or in part consumed, whether remaining single or united; are by the statute 22d and 23d Car. 2. c. 15. reduced to a certainty (c); and the sums so ascertained, with glebes and perquisites, gifts and bequests to the respective parson, vicar, or curate of any parish, are declared to be the annual maintenance of the respective parsons, vicars, and curates; and the rates on the several houses, shops, and other buildings, except parsonage or vicarage houses, within such parishes, are directed to be assessed within a limited time, by the alderman, deputy, and common council of the ward, and churchwardens of the parish, or any five of them, of whom the alderman or his deputy is to be one; and an appeal to the mayor, and aldermen is given to any party aggrieved by such assessment, and provisions are made for the review or alteration of such assessments within a limited time. And three transcripts of the assess-

(c) Vide Appendix.

ments are directed to be made by the assessors, one to be kept among the records of the city, another in the registry of the bishop of London, and the third in the vestry of the parish; and the act further directs that the sums assessed are to be paid to the parsons, vicars, and curates, at the four most usual feasts of the year, or within fourteen days after each feast; and that the payment shall commence from the time when the incumbent begins to officiate; and in case of an impropriation, the impropiator is thereby directed to make the same allowance to the incumbent as was usual before the fire. And it is also thereby provided, that in case of refusal to pay the sum assessed, it is to be levied by warrant of distress from the lord mayor, and that no court or judge ecclesiastical or temporal, other than the persons authorised by that act, shall have any cognizance of the sums to be paid by virtue thereof. And the warden and minor canons of St. Paul's church, London, parson, and proprietor of the rectory of St. Gregory, are to enjoy all tithes, oblations, and duties, in the same manner as before the making of the act.

On the above mentioned decree and statute of the 37 Henry the eighth, c. 12. a variety of points have arisen, and been discussed; as for example, with reference to the extent of the exemption of houses and buildings within the city, whether such exemption is to be restricted to the houses and buildings expressly excepted by the statute, or whether it shall be permitted in any other cases; with respect to the import and operation of the word "rent," as used in the decree; as whether it means actual rent, or estimated rent with reference to the value, a point involving in it the consideration of houses in the occupation of the owners themselves; at what rate the payment in lieu of tithes shall be made as authorised by custom; what shall be the consequence of erecting new houses on the site of old houses, or of erecting a house on the site of a building,

building, as for example, a shed, which was not liable to the payment of tithes.

Thus, where to a suit for tithes of a house in London, it was insisted that the house belonged to a priory which were discharged of tithes by a papal bull; the court held, that by the common law houses paid no tithes, and the right in that case arising immediately on the statute being enacted, which imposes them generally upon every house, no exemption shall be allowed but to such houses as are specially exempted by the statute itself (*d*).

So in respect to the import of the term rent, where a question was raised, whether a rent for half a year of a house in London, and afterwards for another half year, was a yearly rent within the meaning of the statute: It was resolved in the affirmative (*e*).

So where the tithes of a house in London were claimed, the ancient farm rent of which was five pounds at the time of and subsequently to the decree and statute, and a new lease had been recently made of the house, reserving the rent of five pounds a year, in addition to which a great income or fine was covenanted to be paid yearly, at the time of payment of the rent, as a sum in gross; it was contended, that such reservation and covenant were evidently fraudulent, and with a design of depriving the parson of the tithes of the true rent of the house, which belonged to him by virtue of the decree and statute, for that the whole might have been reserved in the shape of rent; but it was resolved by the court, that if so much rent be reserved as was accustomed to be paid at the time of the statute, whatever fine or income may be paid, the parson accord-

(*d*) *Green v. Piper*, Gwill. 164. Cro. Eliz. 276.

(*e*) *Meadhouse v. Taylor*, Noy. 130. See also Gwill 329, in not.

ing to the true construction of the decree, can complain of no fraud; for the fraud thereby prohibited, is, where less rent than was then accustomed to be paid is reserved, or if no rent at all be reserved; for then tithe shall be paid according to the rent which was then last before reserved: and it was farther resolved, that in respect to such houses as were never leased, but inhabited by the owner, this was a *casus omissus*, and that they were not within the decree and statute, and consequently not liable to any payment for tithes (*f*).

But in the same case, it was clearly held, that if no fine or income be paid, yet if no rent be reserved, the parson shall have the tithes according to the decree; for that the case stated by the decree is stated merely as an example, or reason why no rent is reserved, and whether any fine, or income be paid, or not, is immaterial to the parson.

The second, however, of these points appears questionable, and unsupported by reason, and the spirit and intention of the decree. There seems no ground for exempting houses, because they were never in lease, and always in the occupation of the owners. And in a recent case, which I shall presently mention, it was denied by the court (*g*). In regard to the first point, it was much discussed, in a case in which A. being seised in fee of a house in London, which from time immemorial had been let for five pounds per annum, made a lease of it, reserving the rent of five pounds per annum, with a covenant also for the payment of one hundred and seventy-five pounds in the name of a fine and income to be paid in several sums of twenty-five pounds per annum during the term; that is, twelve pounds ten shillings on one of the days on which the rent was made payable, and twelve

(*f*) *Skidmore v. Bell*, 2 Inst.

(*g*) *Infra*, 245.

pounds ten shillings on the other of such days. And it was considered as very dubious, whether tithes were payable under the decree and statute, according to the ancient rent only, or according to the ancient rent and the sum reserved for the fine and income; or in other words, whether the parson was entitled to his tithes after the rate of five pounds per annum, or after the rate of thirty pounds per annum (*b*). However, it was held by Lord Loughborough C. in the minor canon's case, that the defendant having set forth his lease at a low rent, and a fine, and alleged by his answer, that he had never heard of any greater rent being paid, and there being no evidence to the contrary, he was liable only according to that rent (*i*).

But it has been expressly decided, that the rate ordered by the decree and statute to be paid out of the rent of houses in London is assessable on the improved rent of such houses (*k*).

Yet, generally speaking, a defendant in such case may set up a customary payment to protect himself against the claim of the statutory tithe. Thus in a case in which the vicar of the parish of Saint Giles without Cripplegate, exhibited his bill in the court of exchequer against the defendants, as occupiers of houses within the parish, for tithes after the rate of two shillings and ninepence in the pound, according to the yearly rent of their respective houses, and grounded his demand upon the decree and statute; the defendants in their answer admitted, that during the time mention-

(*b*) *Dunn v. Burrell*, Gwill. 299. (*k*) *Sheffield v. Pierce*, Gwill. 503. *Ivatt v. Warren*, Ibid. 1054. (*i*) *Warden, &c. of St. Paul's* 546. *Sayer v. Mumford*, Ibid. 546. *v. Crickett*, 2 Vef. jun. 563.

ed in the bill, they had respectively occupied houses within the parish at different rents, which they specified, but insisted that no such demand was ever made as two shillings and ninepence in the pound, by any former vicar of the parish, nor was the same ever heard of within the parish, till the plaintiff became vicar, which was but two years before the commencement of the suit : And they farther insisted that they were exempt from such payment, after the rate of two shillings and ninepence in the pound, either by virtue of the statute and decree, or by some other lawful means. There was no proof in the cause, whether the houses in question were in lease at the time of passing the act or not ; nor was there any evidence, that the sum of two shillings and ninepence in the pound, was at any time paid, according to the value of the houses, by virtue of the statute and decree ; but it was proved, on the part of the defendants, that till the time of the then present vicar, the witnesses had never heard of any such demand as two shillings and ninepence in the pound for tithes within the parish ; it also appeared by ancient tithe-books of the parson, that less sums which were therein specified, and proved to be in the hand-writing of the collector, had been collected, though, indeed, such payments did not appear uniform. It was also proved, that for nine years, in the time of a former vicar of the parish, the witness lived in the house of one of the defendants, and during those nine years he never paid any more to the vicar than ten shillings a year, or two shillings and sixpence a quarter : therefore, the question in the cause was, whether two shillings and ninepence in the pound of the yearly rent of the respective houses was due for tithes by virtue of the statute, or not.

It was resolved in the negative by three of the barons, the fourth dissentient. They observed that it was evident on the construction of the statute itself, and on the
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the authority of Lindwood, that in many places in the city there had been a custom to pay tithes according to the pound rate, which the statute never intended to alter or enlarge, but to establish; for the statute was not designed in destruction of any settled right. They were also of opinion, that if there had been a payment of less sums, by agreement between the parson and parishioners, they were confirmed by the statute, because it was the design of the statute to settle such customary payments, and to prevent their being unravelled on either side. That accordingly such customary payments and agreements had been complied with ever since the statute, and less sums had been paid by almost every parishioner to the parson, with which they had been content; that although several decrees had been made in the court of exchequer for payment of two shillings and ninepence in the pound, yet no customary payments in any parish had been compounded between the parties, and the manner of tithing had continued the same in each parish, except in such parishes as were otherwise regulated by the statute 22 Car. 2. c. 15.

They observed, that sect. 18, was a perfect exception out of the decree, of all those who had paid less sums; and that, therefore, this could not be urged as a modus, or set up in bar of tithes, for tithes were originally due, and consequently the bar must be complete; but there are no tithes of houses due of common right, for they are not of that species of substances which *reservant in annum*, and therefore the common law, which follows the Levitical code, did not make them tithable; and they are tithable only by special custom, or agreement.

They farther remarked, that the new rate of two shillings and ninepence in the pound was superinduced by the

the decree, and that it were a strange proposition, that the decree was in prejudice of the clergy, when it appeared that less sums were constantly paid for houses in the city than what would be paid if they were rated under the decree; and moreover it appeared, that the ancient payment in lieu of tithes of houses in London was somewhat less than two shillings and ninepence in the pound.

They farther held that this decree was made that all persons should pay the received rents from houses; that where there had been accustomed payments, the tithes were to continue payable according to that custom; and where there was no immemorial custom, yet if there had been by agreement a payment for eight years past, this according to the true construction of the statute was to be regarded as a customary payment; for that the divisions and severances of this houses, wharfs, and warehouses were to be as they had been for eight years past; that therefore it appeared to the court, that if there had been an agreement to pay tithes for eight years past, they were accustomed payments within the statute, consonant to a uniform notion, that if there were tithes by custom or by agreement for eight years past (1), they are within sect. 18, of that statute.

That if all that pay less sums be exempted from payment under the decree, and be not within the decree, nor within the obligation of the statute, the court ought to try whether there be such accustomed payments or not, especially since it appeared by the books of the parson that less sums were collected; and it could not be presumed, that they would have been collected in that manner, if they had not been old accustomed payments;

(1) See vid. *Brayshaw v. Herts*, Gwill. 1315. contr.

for how could those sums have come into the parson's books, if they had not been the old accustomed dues?

That the difference of the payments in the books might be reconciled by supposing some of them to be quarterly, some half yearly payments; that the question related to the inheritance, and the inheritance was to be bound by the court's decree; and where the inheritance is charged merely by custom, it is just and usual, if the parties desire it, to try such custom at law.

The court, therefore, conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law upon the issue, whether any, and what sum or sums less than two shillings and ninepence in the twenty shillings rent had been accustomedly paid by the defendants for tithes, for the houses in possession of the defendants, or any and which of them, although no proof that there had been any regular modus. From this decretal order the plaintiff appealed to the house of lords, insisting that no issue ought to have been directed; but such decretal order *dissentiente clero* was affirmed (m).

Again, in a bill filed by the warden and the minor canons of St. Paul's and their lessees claiming tithes at the rate of two shillings and ninepence in the pound under the decree and act of parliament, the defendants, by their answer insisted upon various payments less than two shillings and ninepence in the pound, by reference to a paper, which they called the first, or ancient rate, and that such payments under it were ancient customary payments. In their subsequent answer to the amended bill, they set up a different rate, and insisted upon the same

(m) Bennet v. Trepase, Gwill. Eq. Rep. 191. 8 Vin. Abr. 568. 633. 2 Bro. P. C. 437. Gilb. pl. 3. Bunb. 106.

by their cross bill, and lord Eldon C. upon the whole record, was opinion that no specific customary payment was set up, as two different payments were set up; and his lordship held, that if a party insist that a less sum than two shillings and ninepence in the pound has accustomedly been paid, he must prove what was the specific sum. Whatever may be the difficulty of believing that so large a sum as two shillings and ninepence could have been paid before the time of Henry the eighth, it does not dispense with the necessity of proving what was the actual amount of it, and inasmuch as the sum of two shillings and ninepence is *prima facie* due, if no other payment can be substantiated by evidence, that sum must be decreed to be paid (p). That in respect to the meaning of the expression "accustomed to be paid," it is clear it must not be construed to extend beyond the time of memory: That though in the case of Bennet and Trepas, it was considered that upon the statute eight years for this purpose were sufficient (q), yet it is not to be considered as settled in that case, that such is the period. It has been urged, that it is sufficient, if within the limits of the ecclesiastical law, which are much shorter than the time of memory (r).

Also, in a recent case, a bill was filed under the decree and statute seeking payment at the rate of two shillings and ninepence in the pound upon the annual value to be let, of premises consisting of extensive warehouses lately erected by the East India company, and used by them in the course of their trade. These warehouses were erected upon the site of small tenements, some of which

(p) The warden, &c. of St. Paul's, London, v. Morris, 9 Vef. 155.

(q) Gwill. 1315. Contr.

(r) 9 Vef. jun. 165.

appeared by the answer to have been formerly occupied at low rents, and as to the others the ancient rents were not known. The answer did not state any specific customary payment in lieu of tithes, but alleged generally, that some less sums than after the rate of two shillings and ninepence in the pound were paid, specifying by a schedule some payments, not however carrying them back to the date of the statute.

The defendants insisted, that the payment according to the statute, could be only upon such of the old rents as were ascertained, and that nothing was to be paid in respect of those premises, the ancient rents of which were not known; and they contended that an issue ought to be directed.

On the part of the plaintiff it was insisted, that here was no allegation of any certain accustomed payment protecting the occupier from this payment at the date of the decree, and statute; that they allege, merely that at particular times there were particular payments with a general allegation, that some less sums than after the rate of two shillings and ninepence in the pound were paid, not referring to the particular sums before stated, as those less sums. The question, therefore, whether an accustomed payment exists, is not raised upon the record: it was further insisted that there being no rents subsisting, the payment ought to be calculated, not upon the whole rent, but upon the present actual value of the premises to be let; that the houses being taken down, and much more valuable premises erected on their site, it could not be alleged that the premises were the same, or that the former rent could be the fair criterion.

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On the part of the defendants it was urged, that the customary payment was sufficiently stated to enable the defendants to go into evidence; that the result of the authorities is, that if a defence appears by the answer, the court will not make a decree against it; but will put it in a course of investigation; that the distinction between rent, and value is perfectly understood, both in common parlance and legal acceptance, and that it would be doing great violence to the construction of the term rent, to give it the sense of the word value. But Sir William Grant, M. R. was of opinion, that no sufficient ground had been shewn by the defendants for directing an issue, and decreed that the payment should be at the rate of two shillings and ninepence in the pound on the value, and directed a reference to the master accordingly; his honour observing, that he was not aware of any case in which an issue had been granted, where the defendant did not specifically state what was the customary payment upon which he meant to insist; that this was not done by the answer either directly, or by reference; that in the case of the warden and minor canons of St. Paul's v. Morris just cited, the lord Chancellor was of opinion, that no specific customary payment was set up, because two different payments were set up; that here the objection is as strong where no specific payment is alleged: in that case, the different payments destroyed the specification; in this case there is no specification at all: that no exemption being claimed, and no customary payments sufficiently alleged, the rector was of course intitled to a decree, after the rate of two shillings and ninepence. That the question then arose on how many pounds was the tithe to be taken? That the premises not being in lease no rent was reserved, all the property was in the occupation of the owners. Upon what was the payment to be? To which it might be fairly replied, that according to

adjudged cases, rent means either actual rent, or estimated rent with reference to the value, according to the clause of the statute, to which it is applicable. That in the case of *Grant v. Cannon* (s), payment for tithe of a house, in the occupation of the owner, was directed to be according to the value admitted in that instance to be sixty pounds per annum, without any enquiry being directed at what rent the house had been last let, or what tithe was last payable. That in a variety of cases of this class the decree expresses, that the defendant shall account and pay after the rate of two shillings and ninepence in the pound for the yearly rent, or value of their premises. Not that the meaning is, that where there is a yearly rent, recourse shall be had to the value; but that the defendant is to account according to the rent, if there be rent, and according to the value, if there be no rent. That this construction is founded upon a sound principle; that in cases, to which none of the provisions of the statute apply, the rector's claim rests upon the first general clause making all houses generally liable to tithes; that if the general object were to subject all houses, particular words are to be construed so as to effectuate such general purpose, with reference to which, there is no reason for distinction between such houses as are let and such houses as are not let; on the contrary, the express exemption of some houses in the statute that never have been let, forcibly implies, that if that exemption were not expressed, all houses, whether let, or not would be liable; that it does not follow where no rent is due, in the strict sense of the expression, that therefore no tithe is due; because on the whole, less violence is done to the statute by construing the word rent in different senses, as it is used in different clauses of the statute, than by holding all such

(s) Gwill. 541.

houses as were never in lease to be without the statute ; that to principle, and authorities there was nothing to be opposed, but a dictum of Lord Coke, for it was not in point in the cause, that where houses have never been let, that is a *casus omissus* and no tithe it payable ; a proposition which can by no means be maintained (t).

In a case arising upon new buildings erected upon the scite of old houses, the defendant set up a customary payment to protect himself from the claim of the full statutory tithe; he established that defence as to three of the old houses; and the court seemed to have held, that a customary payment protected any houses on the same scite, as the premises were altogether out of the statute, if any customary payment at the time of the statute were established. The defendant failed in establishing any customary payment as to the fourth house, and the court, instead of directing an enquiry at what rent the fourth house was last let, immediately decreed, that the defendant should account and pay at the rate of two shillings and ninepence in the pound for the premises, where the old house formerly stood, according to the yearly value ; and took it to be so clear, that the decree was pronounced against the defendant with costs (u).

On the same principle, in another case it was decided to be no defence to a demand for tithe of a house in London, that it stood on the scite of old houses which never paid any tithes. That if it had been shewn, that a less rate had been paid for them, it would have been a defence

.. (t) *Antrobus v. the East India company*, cited *ibid* 12.

company, 13 Ves. jun. 9. See (u) *Williamson v. Gosling*, also *Kinaston v the East India Gwill.* 502.

to that extent ; but an entire exemption shall not prevail. That all houses were intended by the decree is evident from the clause which directs, that dwelling-houses converted into warehouses, and warehouses converted into dwelling-houses shall still pay as mansion-houses ; and also from the exemption in favour of noblemen's houses, and the halls of companies. That as to the clause exempting detached sheds, and other buildings of a similar nature, this is not an exemption in favour of the land ; for buildings, and not the land are the subject of the act, and this privilege does not extend to the building when altered to another description (v). So it has been expressly decided, that a shed or other building exempted by the decree shall be discharged of tithes no longer than the same is continued a shed, or such other building ; for that if it be converted into a dwelling-house, it shall pay tithes according to the true value (w).

A custom, that the parishioners of St. Leonard, Fosterlane, within the precinct of St. Martin-le-grand, shall pay to the parson two shillings in the pound of the rent of their houses by way of tithes, is valid ; for it may have had a lawful beginning ; it may have been a modus for all the tithes of the land, upon which the houses are built, and though it be afterwards built on, that shall not divest the parson of his right (x).

The statute 37 Henry the eighth, c. 12. for regulating the payment of tithes in London, extends both to lay im-

(v) *Bramston v. Heron*, 1054.

Gwill. 1314.

(x) *Dr. Grant's case*, *Gwill.*

(w) *Ivatt v. Warren*, *Gwill.* 259. 11 Co. 16.

propriators, and spiritual persons; but the statute 22 and 23 Car. II. for the maintenance of parsons, vicars, and curates in those parishes which were destroyed by the fire of London, extends to preaching ministers only (y).

The remedies for the recovery of the tithes in London will more properly come under discussion in the next and last chapter, which will treat of the remedies for tithes in general.

(y) Ward v. Hilder, Gwill. 538.

CHAPTER THE TENTH.

Remedies for the Recovery of Tithes or their Value,

REMEDIES for tithes, or their value are in this country administered by various judicatures ecclesiastical and temporal, legal and equitable: They may also in certain cases be enforced by summary process. I shall therefore consider first the jurisdiction of the spiritual courts relative to this subject; next the jurisdiction of the temporal courts, comprehending the courts of common law, and courts of equity. I shall then treat of the nature of evidence in regard to tithes; and of the costs of suits relative to this species of property. I shall then point out the mode of enforcing the payment of tithes by summary process. And lastly, I shall shew in what manner tithes are recovered in the city of London.

I. The law has been long settled, that the ecclesiastical courts have authority in some cases to determine the right to tithes, and in all cases to entertain suits respecting the subtraction, or withholding of tithes; and such their authority is confirmed by several acts of parliament (*a*): But the power of the spiritual tribunal to decide upon the right to tithes, exists only in those instances, in which the right comes in question between spiritual persons, or their respective bailiffs, or servants (*b*). Between spiritual men and laymen, these courts have a jurisdiction only to compel

(*a*) 13 Ed. 1. st. 4. or rather c. 13.

9 Ed. 2. 27 Hen. 8. c. 20. 32 (b) Gwill. 1566. Year book.
Hen. 8. c. 7. 2 and 3 Ed. 6. 11 a. pl. 7.

the payment of tithes, when the right is not in controversy, but merely the fact whether or not the tithes allowed to be due have been subtracted, or withdrawn (*c*). This is a transient personal injury, which may be redressed in the spiritual court by the recovery of the tithes, or their equivalent.

Agreeably to this distinction, if a dispute arise between two parsons to which of them the tithes belong; whether to the one by parochial right, or to the other as a portion belonging to his rectory by prescription, and they both claim by presentation under the same title, so that the right of patronage be not in controversy, the right to such tithes may be determined in the ecclesiastical court (*d*).

Such also is the law, where the question arises between the parson who is patron, and the vicar, whether certain specific tithes belong to the parson, or vicar. The spiritual court may decide between them (*e*).

If the right to tithes is controverted between two clergymen, who have been presented to the same church by several patrons, in that case the spiritual court hath no jurisdiction to determine the right to the tithes, if they amount to the fourth part of the annual value of the church; but the title shall be determined in the temporal court: yet if the tithe in question do not amount to the fourth part of the yearly value of the church, the ecclesiastical court hath in that case authority to decide the right. And if these spiritual persons claim both under one patron, there, although the whole tithes are the

(*c*) Degge, p. 2. c. 26. 3 Bl. Com. 88. See Gwill 7, and 106. (*e*) Degge, p. 2. c. 26. Noy, 147. Moor, 907. Vid. Drake v. Taylor, 1 Stra. 87.
(*d*) Degge, p. 2. c. 26.

subject of controversy, the spiritual court may determine the title to them (*f*).

But if, in a controversy between two spiritual persons relative to the right of tithes, a question is involved in regard to the boundaries of the parishes, it exclusively belongs to the jurisdiction of the temporal courts to determine it (*g*).

But the rule is not universal, that where the parties are both ecclesiasticks, the courts of law will not grant a prohibition; for, though both parties be of that description, yet, if either of them insist upon a deed, or other matter properly triable at common law, a prohibition will certainly lie (*h*).

Thus, in special cases, the spiritual court may decide upon the right to tithes; but its jurisdiction to hold plea for the subtraction and withholding of tithes is general, and is of remote antiquity, and, as I have just observed, confirmed by various statutes; in particular, by the statute, or rather writ of *circumspecte agatis* (*i*) it is declared, that the court Christian shall not be prohibited from holding plea *si rector petat versus parochianos oblationes, et decimas debitas, et consuetas*.

But if any dispute arise, whether the tithes sued for be due and accustomed, it cannot be decided by the ecclesiastical court. It must be determined by the king's courts at common law. It is true, that a *modus decimandi* may

(*f*) Degge, p. 2. c. 26.

862, Willes's Rep. 680.

(*g*) Ibid.

(*i*) 13 Ed. 1. ft. 4. or rather

(*h*) Cheefeman v. Hoby, Gwill. 9 Ed. 2.

as well be the subject matter of a suit in the ecclesiastical court, provided it be admitted between the parties, as the tithes themselves. Thus, where the defendant in a suit in the ecclesiastical court for the subtraction of tithes, filed a bill in equity to establish a modus, and on the mere suggestion of a modus, moved for an injunction to stay the proceedings in the ecclesiastical court, lord Hardwick C. refused the injunction recognizing the right of the ecclesiastical court to retain suits for tithes, whether at the instance of a spiritual person, or lay impropiator, and that as well for a modus, if not denied, as for tithes in kind (*k*).

But if the modus be denied in the spiritual court, the necessary effect of such denial is a transfer of the jurisdiction; the ecclesiastical court cannot proceed *propter defectum jurisdictionis*; the modus must be tried at the common law (*l*). The principle, upon which the spiritual courts are prohibited from the trying of moduses, is that such question affects the temporal inheritance, and the decision must bind the real property; nor will the law suffer the existence of such a right to be decided by the sentence of any individual judge, or without the verdict of a jury; and, moreover, the ecclesiastical, and temporal laws differ in respect to the time of limitation; according to the first forty years constitute a valid custom; whereas by the second it must have subsisted beyond time of memory (*m*).

But although one of the parties to a suit respecting tithes in the spiritual court be a layman, if he do not insist

(*k*) Rotheram v. Fanshaw, Noy, 81. Hetl. 133. 1 Vent. 32. Gwill. 809. 3 Atk. 628. Scott Blacket v. Finney, Gwill. 661. v. Wall, Gwill. 431. Hob. 247. Bunb. 176.

(*l*) Gibs. Cod. 691. Hob. 247. (*l*) Gibs. Cod. 691.

on a modus, or some other matter properly triable at the common law, such court shall determine the question, and a prohibition shall not be granted (*m*).

So the spiritual court may take cognizance of a refusal (*n*) to set out tithes; and after the tithes have been severed, yet by the statute they remain the subject of suit in the spiritual court (*o*); and though the tithes be in fact set out, if the parishioner refuse to let the parson come for them by the usual way, he may still sue for them in the spiritual court (*p*); for a disturbance in the road for the carriage of tithes, is a question of ecclesiastical cognizance (*q*): the spiritual court having the jurisdiction of the tithes, which are the principal, shall also have jurisdiction of the way, through which it is necessary to convey the tithes. In those instances, in which the original matter belongs to the jurisdiction of the spiritual court, the decision of other matters which depend upon it belongs to the same tribunal, though triable by the common law (*r*); and though, as we have just seen, if after the tithes have been set out, the owner, or occupier of the lands detain them, a suit may be maintained against him in the spiritual court; yet, if a *stranger* take them after they have been set out, the parson's only remedy is by an action at law against him (*s*). So it has been held, that where fraud is used to deprive the parson of his tithes, it is not cognizable in the spiritual court, but is to be remedied by an action on the case; as

(*m*) *Cheefman v. Hoby*, Gwill.

362. Willises Rep. 680.

(*n*) *Gale v. Ewer*, Gwill. 1579. 468.

1 Com Rep. 22.

(*o*) Gwill. 220. Cro. Eliz. 843

vid. *Leigh v. Wood*, Gwill. 205,
and *ibid* in not.

(*p*) Gwill. 1572. *Anon.*

(*q*) *Halfey v. Halfey*, Gwill.

(*r*) *Roberts's Case*, Gwill. 233.

12 Co. 65.

(*s*) *Leigh v. Wood*, Gwill.
205.

when there was a custom, that the parson was to have every tenth land for the tithe of corn, beginning from such land as is next to the church, and the occupiers of the land being aware what land would be the parson's, with the view of defrauding him did not till, nor manure, nor sow his land as they did their own, by reason of which fraud the parson sued in the spiritual court for tithes in kind, that is the tenth cock of all the corn, and a prohibition was awarded, on the ground, that the fraud was to be redressed by an action at law (1).

Such is the nature of the ecclesiastical jurisdiction relative to this subject; and, in case of a suit for subtraction of tithes in the spiritual court, such jurisdiction is effectually aided by the statutes 27 Hen. eighth, c. 20. and 32 Hen. eighth, c. 7. which enact, that upon complaint of any contempt or misbehaviour to the ecclesiastical judge by the defendant in any suit for tithes, any privy-counsellor, or any two justices of the peace, or in case of disobedience to a definitive sentence, any two justices of the peace may commit the party to prison, without bail or mainprize, till he enters into a recognizance with sufficient sureties, to give due obedience to the process and sentence of the court.

Farther, by statute 2 and 3 Ed. sixth, c. 13. it is enacted, that if any person shall carry off his predial tithes before the tenth part is duly set forth, or an agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes, or his deputy, from viewing or carrying them away, such offender shall pay double the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws.

(1) *Stebbs v. Goodlock*, Gwill. 158. Moor, 913.

II. The jurisdiction of the temporal courts, in respect to this subject, is next to be considered: And first that of the courts of common law. This jurisdiction is exercised by the courts of common law in a variety of forms. The right to tithes is discussed and decided by them in prohibition, and in those actions mentioned in the several statutes of 3 2 Hen. eighth, and 2 Ed. sixth, I have above alluded to. 1. This species of prohibition is a writ issuing out of the temporal courts directed to the judge and parties in a suit in the spiritual court, commanding them to cease from the prosecution of it, on a suggestion either that the cause originally, or some collateral matter arising in it, does not belong to that jurisdiction; such prohibitions may be obtained out of the courts at Westminster, the courts of great sessions in Wales, or the counties palatine (*u*). The party aggrieved in the spiritual court applies to the temporal court, suggesting the nature and cause of his complaint, in being drawn *ad aliud examen* by a jurisdiction, or manner of process disallowed by the laws of the kingdom; if the matter alleged appear to the court sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute the plea; if the point be too difficult to be decided on motion, the party applying for the prohibition is directed, in order that the matter may be more solemnly determined, to declare in prohibition, that is, to prosecute an action by filing a declaration against the other, on a fiction, which is not traversable, that he has proceeded in the suit below, notwithstanding the prohibition; if upon demurrer and argument, the court should hold the matter suggested to be a sufficient ground of prohibition in point of law, then judgment, with nominal damages, shall be given for the

(*u*) Degge, p. 2. c. 26.

party complaining, and the writ of prohibition shall issue : On the other hand, if the temporal court shall be of opinion, that there is no competent ground to restrain the jurisdiction, then judgment shall be given against the party applying for the prohibition, and a writ of consultation shall be awarded, so called, because upon deliberation, and consultation the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction to be there determined (v).

But although there may be sufficient ground in point of law for granting the prohibition, yet, if the fact which gave rise to it, be falsified, the cause shall be remanded to the prior jurisdiction ; and, in order to put such fact in a course of trial, the party prohibited must appear to the prohibition, and take a declaration, which must always pursue the suggestion, and so plead to issue upon it, denying the contempt, and the fact upon which the prohibition was granted ; and if that issue be found for the defendant, he shall then have a writ of consultation. The writ of consultation is also granted by the court, without any action brought, when, after a prohibition issued, upon more mature consideration, the court are of opinion, that the matter suggested is not a good and sufficient ground to stop the proceedings below (w).

I have already intimated, that if the right of patronage, the boundaries of parishes, or the existence of a modus come in controversy in the spiritual court, those are sufficient grounds for a prohibition to issue ; but there are many other instances, in which such writ shall be granted ; as if it be alleged in the spiritual court, that the lands, of

(v) 3 Bl. Com. 113. (w) 3 Bl. Com. 114.

which the tithes are claimed, are discharged of tithes by the statute of 31 of Henry eighth, or any other statute, a prohibition lies, because it properly belongs to the judges of the common law to expound all statutes (*x*). In like manner, if the suggestion be grounded on the statute of 2 Edward the sixth relative to barren grounds, the writ shall issue (*y*): So, if the parties sue in the spiritual court for the tithes of articles not tithable by the common law, or for the tithes of great wood above twenty years growth, that is a sufficient ground for prohibition (*z*): So, if the spiritual court, in the discussion of matters clearly within its cognizance transgresses the bounds prescribed for it by the laws of England, as where it requires two witnesses to prove a release of tithes; or refuses to admit the release as a defence at all, in such cases also a prohibition will be awarded; for, as the fact of executing a release, or the effect of such release, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, when the two laws differ, to be decided, not according to the spiritual, but the temporal court; else the same question might be determined different ways according to the court in which the suit is depending, an incongruity which no wise government ought to tolerate, and which is therefore a ground of prohibition (*a*). So, if the spiritual court will not suffer the tenant to plead to the right of incumbency, a prohibition will lie (*b*).

Not shall a consultation be granted, notwithstanding the insufficiency of the replication, if it appear to the court

(*x*) Degge, p. 2. c. 26.

666. Hob. 188.

(*y*) Ibid.

(*b*) Green v. Penilden, Gwill.

(*z*) Ibid. and Gwill. 4.

1568.

(*a*) 3 Bl. Com. 112. Cro. Eliz.

upon the whole matter, that no tithes are payable (*c*): Nor even if the prohibition be erroneous, shall the defendant have a consultation, if it appear that the suit in the ecclesiastical court was not well founded (*d*). Nor is it necessary in prohibition, that the proof should be precise; it is sufficient, if it appear, that the ecclesiastical court ought not to entertain the suit; therefore, if a prescription be laid that the parson holds a hundred acres of land in satisfaction of tithes, and the evidence be, that he holds sixty acres only in satisfaction of them, that is sufficient, because the substance is proved (*e*). If a modus be not proved as laid by the plaintiff in prohibition, there must be a verdict for the defendant; but if *any* modus be found, though different from that laid, that is a valid ground for refusing a consultation (*f*). So, after a consultation has been granted, but not upon examination of the matter, another prohibition, notwithstanding the stat. 50 Edw. 3. c. 4. shall be awarded (*g*). So, after a consultation, a prohibition may be granted, if there be any material additions inserted in the libel (*h*). Pending a suit in prohibition, on suggestion of a modus, there can be no suit in the spiritual court for tithes, which have subsequently accrued (*i*).

But where the modus suggested appears to be void, unreasonable, or insufficient, the court will not grant a prohibition (*k*).

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| (<i>c</i>) Gwill. 275. | 217. Cro. Eliz. 736. |
| (<i>d</i>) Gwill. 394. | (<i>b</i>) Earl of Clancard v. Lady Denton, Gwill. 363. |
| (<i>e</i>) Austen v. Piggot, Gwill. 217. Cro. Eliz. 736. Beal y. Webb, Gwill. 220. Cro. Eliz. 819. | (<i>i</i>) Linge v. Gunter, Gwill. 373. |
| (<i>f</i>) Brook v. Richardson, Gwill. 1303. 1 Term Rep. 427. | (<i>k</i>) Fletcher v. Wilkinson, Gwill. 675. |
| (<i>g</i>) Sibley v. Crawley, Gwill. | |

If either the ecclesiastical judge, or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them to repair the party injured in damages.

2. In respect to actions maintainable in the courts of common law for tithes, they owe their origin to the 32 Hen. eighth, c. 7; by the 7th section of which it is enacted, that any person having an estate of inheritance, freehold, term, or interest in tithes, and being disseised, or otherwise kept, or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same, as the case may require, in like manner as they may for lands, tenements, and other hereditaments. By force of this statute, therefore, an action of ejectment will lie for tithes (*l*).

Another species of remedy in the temporal courts for the subtraction of predial tithes is provided by the statute of 2 and 3 Edw. sixth, to which I have just referred; whereby the treble value of this species of tithes so subtracted or withheld, may be sued for in the temporal courts; and, in truth, such treble value is not more than an equivalent to the double value to be sued for in the ecclesiastical court: for a party may sue for and recover in the ecclesiastical court the tithes themselves, or a recompense for them by the ancient law, to which the suit for the double value is superadded by the statute. But as no action lay in the temporal courts for the subtraction of tithes themselves, therefore, the statute gave a treble forfeiture, if sued for there, in order to make the course of justice uniform by giving the same reparation in the one court, as in the other (*m*).

(*l*) See Selw. L. of Ni. Pri. 1069, 1070. (*m*) 3 Bl. Com. 89.

Upon this statute, it is to be observed, that an opinion originally prevailed, that as the person to whom the treble value is thus given, is not specified, such value of right belonged to the king: But in Easter term, 29 of Elizabeth, it was adjudged, on an information in the court of exchequer, that the treble value did not belong to the crown, but to the party interested, who may maintain an action of debt for the recovery of the same; and, in conformity to this decision, an action of debt, at the suit of such party, has been ever since considered as the proper remedy (n).

Yet this remedy, by the express terms of the statute, is restricted to predial tithes, and shall not be extended to such as are mixt, or personal. Thus, where in an action on this statute for not setting out the tithes of cheese, calves, and lambs, the plaintiff obtained a verdict; on motion in arrest of judgment, it was objected that the tithes in question were not predial tithes, and consequently not within this statute, which being penal, ought not to be extended by implication; and of this opinion was the whole court. So where the plaintiff declared for not setting out predial tithes, and *other tithes*, as the tithes of lamb-wool, &c., and the jury found a general verdict, judgment was arrested upon the same objection (o). But an action of debt may be maintained on this statute for not setting out small tithes, as well as great tithes, provided they are predial tithes (p).

This species of action may be brought by the rector, or by one (q) or more (r) farmers of the rectory. If the rector be entitled to two parts, and the vicar to a third

(n) Selw. L. of Ni. Pr. 1073. 915.

(o) Selw. L. of Ni. Pr. 1074. (r) Kent v. Penkevon, Cro.

(p) Selw. L. of Ni. Pr. 1075. Jac. 70.

(q) Day v. Peckwell, Moor,

part of the tithe, and the parson and vicar by several leases demise their respective shares to a third person, such lessee may maintain an action for not setting forth *all* the tithes.

The right to tithes accrues immediately on the severance; consequently, this action must be brought by the person intitled to the tithes at the time of the severance. Thus, where A. executed a lease of tithes to B. on a day subsequent to the severance, but before the tithes were carried away by the occupiers of the land, it was adjudged that B. could not maintain an action on this statute (s). The action can be brought by the party grieved only; thus where this action was brought by the plaintiff for himself *and the queen*, judgment was arrested (t). A. being possessed of a lease of tithes, in right of his wife, as executrix of her former husband, granted "all his right, title, and interest" in the aforesaid tithes to I. S.; it was holden that the grant was good, and that I. S. might maintain an action on this statute for not setting out tithes (u). If an executrix of the lessee for years of a rectory marry, the husband and wife may join in an action on this statute (v). As the action in this statute is a personal action, tenants in common of tithe must join as plaintiffs. This action may be maintained by executors, for it is within the equity of the statute of the 4 Edw. third, which gives to the executor an action of trespass *de bonis testatoris*, but such action will not lie *against* executors (w).

(s) Wyburd v. Tuck, 1 Bos. affirmed on error, Greenwood's case, Clayt. 28. said per Twissden, and Pull. 458.

(t) Johns v. Carne, Moor, 911. J. to have been adjudged, 1 Sid. Cro. Eliz. 621. S. C. 407.

(u) Arnold v. Bidgood, Cro. (w) Mr. J. Moreton's Case, Jac. 318. 1 Vent. 30. 1. Sid. 407. 2 Keb.

(v) Beadles and wife, v. Sherman, 502. S. C. 1 Sid. 88. but see man, Cro. Eliz. 613. Judgment 1 Vern. 60.

Generally,

Generally, as we have before seen, the person intitled to the nine parts, at the time of severance, ought to set forth the tithe; and, if he fail in so doing, the owner of the tithe may sue him, although his interest in the *land* be determined before the tithes were carried away, provided he remain owner of the *corn* (x).

If there be two joint-tenants, and one only enter and occupy, this action is maintainable against the joint-tenant who occupied alone (y). So, if there be two tenants in common, and one of them sets out his tithe, and the other carries it all away, the action shall be brought against that tenant in common alone, who carried the whole tithe away (z).

If a person buy corn standing of the proprietor of a rectory, he must, as we have before seen, pay tithe, unless he has special words in the contract to discharge him from payment of tythe; and the carrying away of such corn without setting out the tithe, will render him liable to an action on this statute (a),

If a party intitled to tithes agree by parol with the occupiers of the land that they shall hold the lands discharged of tithes for a certain time, or during the life of the tithe-owner, in consideration of the payment of a certain sum annually, an action of *indebitatus assumpsit* may be maintained by the tithe-owner against the occupier for the non-payment of the sum agreed on. If, by the terms of the

(x) *Kipping v. Swayn*, Cro. 122.

Jac, 324.

(a) Selw. L. of Ni. Pr. 1091

(y) *Cole v. Wilkes*, Hutt 121. — 1093. *Moyle v. Ewer*, Cro. Jac.

(z) *Gerard's case* cited, and 361.

said to have been adjudged, Hutt.

agreement the money is to be paid on a certain day, interest will be recoverable from that day; but if it be merely agreed that the money shall be paid, and there is not any day fixed for the payment, then interest cannot be recovered (*b*).

Secondly. Tithes are also the subjects of the cognizance of courts of equity. Such jurisdiction belongs to the court of chancery (*c*). And the court of exchequer, as a court of revenue, has, on the equity side of it, always had an original jurisdiction over tithes (*d*); Tithes were always part of the possessions of the crown; and it is the peculiar province of that court to protect such property as belongs to the king: From the earliest reports or records of the law, it appears, that the court of exchequer has uniformly exercised this power over tithes; and even were the point problematical, the constant practice of that court for so many centuries would now warrant the exercise of such immediate and absolute jurisdiction; and, in either court, a suit may be maintained either for tithes, or a modus (*e*). A bill in equity lies to be relieved against the subtraction of predial tithes, notwithstanding that the subtraction of this species of tithes is a matter which, upon the above mentioned statute 2 and 3 of Edw. sixth, c. 13., may be relieved at law (*f*). Nor is the minuteness of the value of the tithes demanded an objection to a party's asserting it in a court of equity, if his right to the tithes be controverted; for then he may properly institute a suit, in order to ascertain and settle such right. But in a case in which no question of right was involved, and

(*b*) Selw. L. of Ni. Pri. 1070. Anon. Gwill. 527. 2 Freem. 27.
Shipley v. Hammond, London Sit-

ings, H. 44 G. 3. Lord Ellen-
borough, C.J. 5 Esp. N.P. C. 114.

(*d*) Gwill. 1084.

(*e*) Anon. Gwill. 472.

(*f*) Hele v. Pronte, Gwill.

(*c*) Gwill. 136. Toth. 285. 509.

the tithe claimed was of very trivial value, it appearing, that the defendant had paid all his tithes to the plaintiff except for six calves, for each of which, by custom, only a halfpenny was due, the court of exchequer declared the bill to be vexatious, and ordered it to be dismissed (*g*).

A party cannot enforce, in equity, the payment of the treble or double value of the tithes made payable by the statute (*b*); and it is usual, and was formerly held essential in the prayer of the bill for an account of tithes, expressly to waive the penalty or forfeiture, and require only an account of the single value of the tithes demanded. However, in modern times, that strictness has been relaxed, and such express waiver held not to be requisite; and in a recent case (*i*), in which the bill wholly omitted it, but prayed an account of the single value of the tithes, the court held such omission to be immaterial, since the waiver, though not expressed, was necessarily implied: And it was always held, that if an executor of a parson brought a bill for tithes, though by his bill he do not offer to accept the single value, yet being only executor, and not the parson himself, he was not intitled to a forfeiture under the statute, and consequently was not obliged to waive it (*k*).

It is sufficient to sustain a bill for tithes by a layman, to state generally that he is intitled to them; and for a lay rector to set forth in the bill that he is seised of the impropriate rectory, without shewing, that he had received the tithes (*l*).

(*g*) *Griffiths v. Williams*, Gwill. 1383. 1 Anstr. 100.
549.

(*k*) *Anon.* Gwill. 532. 1 Verq.

(*b*) See 3. Burn, Eccl. L. 501. (*l*) *Lowther v. Bolton*, Gwill.
160. 120.

(*i*) *Wool's v. Walley*, Gwill.

A parson and vicar cannot join in one bill, and suggest different modusses, because though the vicarage were originally derived out of the parsonage, yet the inheritances are now several and divided, and therefore distinct bills should be preferred by them (*m*). A sequestrator alone cannot sustain a bill for tithes, because he is a bailiff, and accountable to the bishop, and has no interest in the subject (*n*); but the bishop and sequestrator must join in such suit (*o*): And, in case of the lunacy of the incumbent, the bishop and sequestrator cannot maintain a bill for the tithes, without making the incumbent, or his committee, a party (*p*).

Although a defendant may in equity insist on several species of defence, provided they be consistent, if he undertake to prove a general exemption, and prove merely one which is partial, he cannot have the benefit of the latter (*q*).

It is sufficient in an answer, if it give the plaintiff notice of the general nature of the case to be made against him (*r*).

In respect to the parties to such suit in equity, a bill may be brought by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general modus (*s*). But where the impro-

(*m*) Anon Gwill. 472.

(*q*) Leigh v. Maudsley, Gwill.

(*n*) Berwick v. Swanton, Gwill. 703. Bunb. 296.

537. Bunb. 192.

(*r*) Baker v. Athill, Gwill.

(*o*) Bishop of Norwich v. 1423. Anst. 491.

Eachard, Gwill. 610.

(*s*) 1 Atk. 283. Mitf. 145.

(*p*) Bishop of London v. Nichols, Gwill. 648 Bunb. 141.

146.

priator,

priator, or his lessee files a bill to establish his right to tithes against the vicar, the patron of the vicarage ought to be made a party (f).

Where a rector of one parish claimed tithes in kind out of a whole liberty, and another a money payment out of a part of it, the owner of the *greater* part of the liberty and his tenants filed a bill to have the *modus* established, and that the two rectors might interplead, and that a commission might issue to ascertain what lands in the liberty were within the one parish, or the other: The court held, that the other owners of the lands in the liberty ought to have been parties (u). In a like manner, to a bill for a portion of tithes in a neighbouring parish, the vicar of that parish must be a party (v). A bill lies to perpetuate the testimony of witnesses to prove a *modus* (w). But a bill cannot be sustained to support a *modus* which is not disputed (x). Nevertheless if an action at law be brought by the lessee of tithes for subtraction of them, that is a sufficient ground for filing a bill to establish a *modus* (y).

A *modus* shall not be established in equity against a parson without a trial at law, if he desire an issue (z); but if on a bill filed to establish a *modus*, he decline trying its validity at law he shall be decreed to accept the same in

- (f) *Calmell v. Sherratt*, Gwill. 534. 1 Vern. 185.
 1171. (x) *Wollaston v. Wright*,
 (u) *Wollaston v. Wright*, Gwill. 1454. Anstr. 1801.
 Gwill. 1454. Anstr. 1801. (y) *Lord Stawell v. Atkins*,
 (v) *Bailey v. Worrall*, Gwill. 1434. Anstr. 564.
 632. Bunb. 115. (z) *Webber v. Taylor*, Gwill.
 (w) *Somerset v. Fotherby*, 656.

future.

future (*a*). If in a suit in equity the validity of a modus is referred to a court of law, it must be taken for granted, that the fact of its having immemorially existed is admitted, and that the only consideration is what objection will be made to it in point of law for the want of certainty, equality, or of any other properties, which are essential to make it good (*b*). Where on a bill for tithes, a modus is proved different from that stated in the answer; on the one hand, an issue shall not be granted, if the parson resists it (*c*); and on the other, there shall not be a decree for tithes in kind, which the modus affects to cover (*d*): Or if in case of such suit, no particular modus is mentioned in the bill, or alleged by the answer, yet if the plaintiff's own witnesses shew a reasonable ground for a modus, the court will not proceed to decree an account of tithes (*e*). Where a modus is alleged generally, and without any restriction, the court cannot direct an issue to try a modus with a restriction (*f*); but the court is not concluded from directing an issue to try a modus by a decree for an account in a former cause, in which the same modus was insisted on, but no issue directed upon it (*g*).

In a suit or tithes in the court of exchequer, the decree is, that the defendant shall account for and pay what tithes were due, at the time of filing the bill: In the court of chancery the decree directs such account and payment to the time of the master's report (*b*).

(*a*) *Cleaves v. Kynston*, Gwill.
1048.

(*b*) *Pike v. Dowling*, Gwill.
1166. 2 Bl. Rep. 1257.

(*c*) *Bishop v. Chichester*, Gwill.
1316.

(*d*) *Scott v. Fenwick*, Gwill.
1252.

(*e*) *Ekins v. Dormer*, Gwill.
800. 2. 3 Atk. 534.

(*f*) *Ibid.*

(*g*) *Collins v. Sir Henry Gough*,
Gwill. 1294.

(*b*) *Carleton v. Brightwell*,
Gwill. 676. 2 P. Wms. 462. *Bell*
v. Read, Gwill. 804. 3 Atk. 590.

III. I pro-

III. I proceed now to consider the nature of the evidence, which is adduced in suits, and actions relative to tithes.

Where the tithes have been taken by the defendant under an agreement and composition with the plaintiff, an action of assumpsit on the contract is the proper remedy, and no farther evidence is necessary in that case, than of the occupation of the defendant, his contract with the plaintiff, and the retaining of his tithes in consequence of such contract. But where there is no existing contract, and the farmer has neglected to set out his tithes; or has made a fraudulent and colourable severance of them; and then carried them away, the tithe-owner may, as we have just seen, bring an action of debt for the treble value of such of the tithes as are predial (*f*).

In ordinary cases (*g*), it will be sufficient in this action for the plaintiff to prove himself in possession of the rectory, or tithes without entering into his title; as where he has been for some time in the uninterrupted receipt of tithes from the different land-holders in the parish, and no one has disputed his title (*b*). In cases therefore where no acknowledgment of his title has taken place, he must prove it. If he claim as parson (*i*), he must prove his ordination by the bishop; his institution and induction into the living; and as it is asserted in some books, his subscription to the declaration in the act of uniformity in the presence of the bishop; and his reading the thirty-nine articles within two months, and declaring his assent to them. This latter evidence however does not now seem

(*f*) Peake's L. of Ev. 411. 1482. Radford v. Mackintosh,

(*g*) Bull. N. P. 188. 3 T. Rep. 635.

(*b*) Chapman v. Beard, Gwill. (*i*) Bull. N. P. 188.

to be strictly necessary, until some ground is laid by the defendant, that the plaintiff has not complied with those requisites; for the presumption is, that every man has conformed to the laws, unless there be some evidence to the contrary. Thus fifteen years' possession of a benefice was held to be *prima facie* evidence of a regular induction, and having read the thirty-nine articles; and no stress was laid on the testimony of several persons, who stated that they had generally attended divine service for the two months next after the plaintiff's becoming rector, and that none of them had heard him read the thirty-nine articles, or had heard of his reading them; the court observing that there was no evidence to shake the legal presumption in favour of the incumbent; that it was not shewn that any witnesses attended all divine service on each Lord's-day for two months after the plaintiff's induction, and deny his having read the articles during that time. The circumstance of these witnesses not having heard him do so on those days when they happened to attend is nothing; unless you can answer for each time that divine service was performed in the two months: That if there had been any want of title, the parishioners should have complained to the bishop, or disputed it while the memory of the thing was recent: That there is no record or repository for the evidence of induction, or of reading the articles, and the witnesses cannot live for ever: That if those facts are not to be presumed from length of time, that circumstance, which strengthens all other titles will but serve to weaken or destroy this(*k*). If the plaintiff sue as a lay impropriator, the strict proof of title is to shew that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under

(*k*) Chapman v. Beard, Gwill. 1482. 3 Anfr. 942.

whom

whom he claims (*l*); but as deeds and instruments are liable to be lost, length of possession and old deeds conveying tithes have been deemed sufficient evidence of title (*m*). When the plaintiff sues as farmer of the tithes, he must prove a lease by those under whom he claims (*n*); and the mere circumstance of the plaintiff's having, as farmer of the tithes, called a meeting of the parishioners to treat with them for a composition, when no agreement took place in consequence, is not sufficient, though no one at that meeting disputed his title (*o*).

The plaintiff must then prove the defendant's occupation of land within the parish; his taking away the tithes; and the value of them; and if there has been any agreement for composition, he must shew such composition to have been discharged by six months' regular notice expiring at the end of the year, in the same manner as in the common case of a tenancy from year to year (*p*). On this evidence the lands will be presumed to be chargeable, unless the contrary be shewn on the part of the defendant, and though they have never paid tithes, that alone will furnish no defence, if the declaration state that tithes were yielded and *payable* within forty years next before the passing of the statute (*q*): though in a case in which the declaration merely stated that they were yielded, and *paid* within forty years next before the statute, some evidence of payment was required (*r*). And though a layman cannot

(*l*) Vid. Com. Rep. 651.

(*o*) Wyburd v. Tuck, Gwill.

(*m*) Kynaston v. Clarke, 5 1517.

T. R. 265. Gwill. 960.

(*p*) Vid. sup. 123, 124.

(*n*) Bull. N. P. 188, Bishop v.

Chichester, Gwill. 1316. 1 Bro. T. Rep. 260.

Ch. Rep. 161.

Ev. 412, 413.

(*q*) Mitchell v. Walker, 5
Peake's L. of (r) Lord Mansfield v. Clarke
cited *ibid.* 264.

prescribe in a *non decimando*; yet if the tithes belong to a lay impropriator, and the land in question has been constantly ploughed, and no tithe paid, it may be ground for the jury to presume a grant by him, and severance of the land from the rectory: In this case, therefore, it will lie on the defendant to shew that it has been constantly before in a state of tillage (r).

In cases where the lands are discharged from tithes by a *modus*, the evidence will be of the same nature as in all other cases of custom, to which I have above alluded (s). But where the defendant contends that the lands are wholly exempt from tithes, he must shew the ground of discharge; for the mere circumstance of their not having been before charged is not sufficient, because a layman cannot set up a prescription *de non decimando* without deducing his title from some ecclesiastical person; though he may set up a *modus* without any such aid (u): And evidence of a *modus* will support a plea of *nil debet* to an action of debt for tithes of hay and corn (v).

Where the exemption from tithes is claimed of lands belonging to the monasteries dissolved by the statutes 31 Henry the eighth, c. 13. and 32 Henry the eighth, c. 24, such lands must be shewn to have belonged to a religious house dissolved by one of those statutes; and that while in the possession of such house, they were exempt from tithes.

(r) Vid. Com. Rep. 648. 3
Atk. 628. 5 T. Rep. 264.
Peake's L. of Ev. 414.

(s) Peake's L. of Ev. 414.
(v) Charry v. Garland, Gwill.
951.

(t) Supr. 148, 149.

The mere circumstance of lands having belonged to a monastery so dissolved is *prima facie* evidence, that they immemorially held it so discharged, unless it be proved that the land has paid tithe. In like manner, where the exemption is claimed on the ground of unity of possession by the religious house of the parsonage and of the land, if the unity be proved, and the time of the union cannot be ascertained, and there is no evidence of tithes having been paid, the presumption will be in favour of its exemption (w).

The fact of lands having belonged to a monastery is generally proved by the survey of their lands, at or soon after the time of their dissolution, or by some other public documents, most of which are to be found either in the Augmentation-office, or Chapter-house.

In such cases the pope's bull of exemption may be proved by the bull itself; or by an exemplification of it under the bishop's seal, and proof that the lands in question belonged to those, who are mentioned in it (x).

To prove a composition real, the deed by which it was entered into must, as we have before seen (y), be proved, or evidence shewn, from which it may be inferred, that such deed did once exist.

Books of account, and memoranda of a preceding rector or vicar relative to tithes, are constantly received in evidence to support the demands of his successors (z).

(w) Peake's L. of Ev. 416, 417. (x) Lord Arundel's case,
(y) Peake's L. of Ev. 89. Gwill. 620. 12 Vin. Abr. 255.
414—417. Vid. Benson v. Olive, pl. 3. Legros v. Lovemore, Gwill.
Gwill 701. Bunb. 284. 529. See also Gwill. 653. Supr.
(z) Supr. 221. 149.

In like manner, as we have seen (*z*), books of former lessees of a rectory containing entries of the receipt of agistment tithe after the determination of their leases, have been admitted to support the claim of the impropiator to that species of tithes; although in such case the admissibility of that evidence were strongly controverted; the court holding, that the case of the parson's book was not the only exception to the general rule; that any other case falling within the same principle would be an exception; and they decided that principle to be applicable to the case before them (*a*). So a book of a former collector of ancient date found in the hands of his successor was admitted in evidence, even though the hand-writing of the collector could not be proved (*b*). A survey of a religious house, taken in the year 1563, was allowed good evidence to prove a vicar's right to small tithes (*c*). Copies from the cathedral churches of the surveys of crown and church lands, made under the commissions issued by the parliament in the year 1647, were held to be admissible evidence, the originals having been lost in the fire of London (*d*). Evidence of the perception of the tithe of hay, and of small tithes by the vicar, is evidence of a prescription, which supposes an endowment (*e*). And proof of one single instance within thirty years of a composition with the vicar for agistment tithe of the close, in which it was claimed, was held sufficient to entitle him to the small tithes, on a bill filed by him for tithe herbage, and furze (*f*). And even proof of the payment, and

(*z*) Supr. 149.

Camb. 2 Gwill. 799. 1 Will. 170.

(*a*) Illingworth v. Leigh, Gwill. 1615.

(*d*) Underhill v. Durham, Gwill 542.

(*b*) Jones v Waller, Gwill. 847.

(*c*) Travis v. Oxtan, Gwill. 1066.

(*e*) The vicar of Kellington v. master and fellows of Trin. Coll.

(*f*) Goole v. Jordan, Gwill. 648. Buub, 144.

receipt of a bad *modus* is evidence of a title to tithes in kind. For it amounts to proof of payment of a temporary composition in lieu of the tithes demanded, which is evidence of enjoyment, which is proof of an endowment, which consequently is a title to the tithes themselves (*g*). Where no endowment appears, yet evidence, which will not support a prescription, may be adduced to prove an endowment: for endowments of vicarages have in general, if not all of them, been made within time of legal memory. Many of them are lost, and can be proved only by usage. It were unreasonable to expect in such cases proof of a prescriptive right (*h*).

On a bill for tithes, and a *modus* set up by the answer, a former bill by the rector against an occupier, and his answer setting up a different *modus* were offered to be read in evidence; and the court held them to be admissible, if the lands could be identified (*i*). Depositions taken in a former cause between the same parties, in which the same question was in issue; were admitted to be read (*k*). And on the trial of an issue, whether the vicar was intitled to an agistment tithe, depositions in a suit by a former lessee, and an occupier were offered in evidence without producing either the bill or answer: It was objected that without the bill and answer, or proving that all due diligence had been used to discover them, but without effect, and giving collateral proof of their contents, these depositions could not be received; and it was necessary to produce the bill and answer in order that it might be seen who the parties were, and what were the questions in issue between them; because the depositions themselves could

(*g*) *Travis v. Oxtou*, Gwill. 1074. (*i*) *Ashby v. Power*, Gwill. 1239.
 (*h*) *Jackson v. Walker*, Gwill. 1231. (*k*) *Morgan v. Nevill*, Gwill. 1046.

be evidence only between the same parties, or those claiming under them, and upon the same point; that it was clear from the depositions themselves, that the vicar was not a party to the suit, because he was examined as a witness; that the suit therefore was, as to him, *res inter alios acta*; that the only ground on which it could be contended they might be admitted was, where hearsay or reputation was evidence; that hearsay could not be evidence in this case, because it was to prove a particular fact; that the very depositions themselves were confined to the claim of agistment tithe in a particular place, and did not affect to speak of the general custom of the parish. The judge was clearly of opinion, that they were inadmissible, and accordingly rejected them. A new trial was nevertheless granted by the court of exchequer, on the express ground, that the judge was mistaken in rejecting the above evidence, and upon a second trial a verdict was found for the impropriatrix (1).

But where a parson filed a bill against several parishioners, and they filed a cross bill against him, and stated the deposition of a witness then dead in a former cause between the parson, and another parishioner on the same point, the court would not permit it to be read, though the parson alleging he did not recollect its contents referred to it in his answer (m).

A verdict between a parson, and one occupier is evidence upon a like point between the parson, and another occupier, though it was objected that this was *res inter alios acta*; but the court said, that in these cases,

(1) *Millingworth v. Leigh*,
Gwill. 1615.

(m) *Scott v. Allgood*, Gwill.
1369.

a decision between a vicar and one occupier was evidence in a case between the vicar and another occupier, and to exclude the evidence would end in the exclusion of nine-tenths of the evidence in that and in all similar cases; but that the evidence was, at the same time, open to all imputation of fraud, collusion, or mistake (*n*); and a verdict not proved to relate to the same lands shall not be received as evidence (*o*).

In respect to a terrier, which is frequently adduced in evidence in cases of this nature, it is an instrument well known in the law; by the canons it is directed, that an enquiry shall be from time to time made of the temporal rights of the clergyman in every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information; that return, which generally has the minister's signature, is denominated a terrier, and derives its authenticity from being found in the proper place; that place is the bishop's register office (*p*), or the registry of the archdeacon of the diocese (*q*); and unless it come from one of those quarters, it cannot be admitted as evidence: therefore, it has been decided that a paper purporting to be a terrier found in the charter chest of Trinity-college, Cambridge, who were land-holders in the parish, was no evidence to disprove a modus (*r*). But as against one of the prebendaries of Litchfield, a terrier found in the registry of the dean and chapter of Litchfield, was held sufficient evi-

(*n*) *Travis v. Chaloner*, Gwill. Gwill. 1593, and 3 Burn. Eccl. 1238. L. 379.

(*o*) *Benson v. Olive*, Gwill. (*q*) *Potts v. Durant*, Gwill. 702. 1450. 3 Anstr. 789.

(*p*) *Atkins v. Hatton*, Gwill. (*r*) Gwill. 1406. 1406. 2 Anstr. 386. See also

dence (s); for though in general, an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place, in which such an instrument ought properly to be deposited; yet where a connection can be established so as reasonably to account for the custody in which the instruments are found, the courts have somewhat relaxed the rule, and admitted them to be read, though not coming from exactly the most proper repository; thus in that case the court of king's-bench proceeded on the ground of the connection between the terrier and the custody in which it was found, and a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend of nearly the same date. But when the custody is merely private and unconnected with the subject matter, the courts have never gone the length of admitting such papers in evidence. Thus an instrument, purporting to be an endowment without the seal, and another purporting to be an *inspeximus* thereof under the seal of the bishop, were rejected as evidence, inasmuch as they came out of the hands of a private person wholly unconnected with the matters contained in them (t). It has also been held, that as against the parson, a terrier is in all cases strong evidence; but it is never admitted for him, unless it be signed by the churchwardens, and in case they are of his nomination by some of the substantial inhabitants of the parish also; and in the case of a bill filed by a vicar against the impropriatrix of a rectory, the principal object of which was the recovery of agistment tithe, in support of the claim, several terriers were produced, some of which stated the vicar to have all small

(s) *Miller v. Foster*, Gwill. 1406. in not. Vid. Peake's L. of 1450. 3 Anstr. 789.
E. 88.

tithes generally, and others gave him expressly, and in terms, the herbage of barren cattle. The former of these terriers was signed by the churchwardens only: And it was objected first, that it was no terrier at all, because made by the churchwardens only, and not signed by the vicar: that the minister's signature was essential to give the instrument the character of a terrier; that where it wanted that signature, the court had often refused to receive it, though it came from the minister himself: 2dly, that even supposing it to be a proper terrier, yet that it could not be admitted in evidence in that cause, as against the rector, because not signed by any person claiming under, or on the part of the rector. But the court were of opinion, that the terrier was admissible, for that it had been recognized in the character of a terrier by the spiritual court; that such imperfect terrier had been often received of late in the court of exchequer: that it was true lord C. B. Skynner had once rejected it, but that he had afterwards changed his opinion, and since that time it had been uniformly received; that the terrier in question was signed by persons not only in no respect interested; but whose duty it was from their official situation to sign it, and that the want of the vicar's signature made it stronger evidence in his favour (u).

On the trial of an issue whether the defendant by himself or his agents was in possession of a certain number of acres of glebe lands belonging to the plaintiff, as rector of certain parishes therein mentioned, a map made under the directions of the lord of the manor for the time being, was produced by the defendant, the then lord of the manor, and was held to be unexceptionable evidence as against him (v).

(u) *Illingworth v. Leigh*, (v) *Allott v. Wilkinson*, Gwill. 1615. See Bull. Ni. Pri. Gwill. 1585.
248.

In most cases, it would be absolutely impossible after a great length of time to prove the execution of a deed, or even the hand-writing of the parties. It is necessary that a period of limitation should be fixed, otherwise new questions would daily arise, and therefore courts of justice have laid it down as a rule, that a deed of above *thirty* years standing requires no farther proof of its execution than the mere production of it, provided the possession has been according to the provisions of the deed, and there is no apparent erasure, or alteration on the face of it (*w*).

A decree made between the same parties on the same point, not appealed from, but signed and inrolled, is conclusive; and the rule is founded on sound policy, which requires, that the decrees of courts of justice should not be repugnant to each other on the same point of right; but a decree which is to have this conclusive effect must be made between parties who have a competent interest in the subject of it: therefore, in a suit by a vicar against occupiers for an account of all small tithes, a decree in a suit instituted in that court by the then vicar, in the reign of Charles the first, declaring the plaintiff to be entitled to all small tithes under the endowment, was held not to be thus conclusive; the court observing, that the suit, in which that decree was pronounced, was between the vicar and the impropriator who was the patron; that one of the parties had an absolute right, but the vicar though he had the freehold of the vicarage had no interest beyond his own incumbency: As vicar he could do no act to bind the interests of his successors in the vicarage; Before the

(*w*). Peake's L. of E. 109. Gwill. 702.
Bul. N. P. 255; 256. See also

restraining statutes, he could not have affected those interests without the concurrence of the ordinary, as well as of the patron ; that reason and policy alike require that the ordinary should be a party to a suit, the end of which is to bind and conclude those interests which the law hath appointed him to watch over and protect ; and though the decree which was so pronounced, was in favour of the vicar's claim, yet if there were not parties sufficient to sustain the suit, the decree pronounced in favour of the vicar could be no more conclusive than if it had been to the prejudice of his claim ; considering the decree in this light it has no more force, in respect to the successors of the vicar who was a party to it, than a decree for an account of the tithes (*).

But in a suit by the rector for tithes, in which the defendants insisted that the lands were parcel of one of the greater monasteries dissolved by the stat. 31 Hen. eighth, a decree was offered to be read in evidence, in which the lessee only, and not the unpropriator, was a party ; an objection was taken to the reading of it, for that no admission of the lessee shall bind him who has the inheritance, and who was no party to the decree : Lord C. B. Montague, and baron Price were of opinion, it should be permitted to be read, stating, that they should have made no doubt of reading it, if the lessee had prevailed, and therefore that they saw no reason why it should not be read, since he did not prevail ; but baron Page was of opinion, it ought not to be read, which it seems would have been the more correct adjudication (y). It is generally true, that

(*) Carr v. Heaton, Gwill. 1258. (y) Bishop of Lincoln v. Sir Wm. Ellis, Gwill. 632. Bunb. 170.

a decree shall not be read, if it do not relate to the same lands and title as are in question (z).

The king's books are conclusive evidence of the value of a living : Thus, where the defendant to a bill for tithes insisted, that the plaintiff had taken a second living above the value of eight pounds a year, the defendant was decreed to account ; for though the value were in reality above eight pounds a year, yet it being under that value in the king's books, they were held conclusive (a). But ancient valuations are not conclusive evidence of the value either of lands, or of livings (b).

We have before seen that mere non-payment of tithes, although from time immemorial, is no discharge, without shewing some special ground of exemption (c). But in a case, in which the plaintiff rested on his common law right of rector, and the defendant insisted, that the lands he occupied were formerly part of lands of the dissolved monastery of Shaftesbury, and exempt by prescription, and shewed the rector not in the perception of all the tithes ; a vicar in possession of some ; tenants of the suit of a manor, and certain demesnes in possession of others ; and also other lands, a whole floor, paying none at all ; the court held the inference from that evidence to be, that the rector's right was very precarious, and that it let in every reasonable title which the evidence would support. That a portion might exist against him ; and that the defendant deriving title to exemption from spiritual persons,

(z) *Benson v. Wise*, Gwill. Cro. Car. 456. 2 Lutw. 1305. 701. Bunb. 284. 17 Vin. Abr. 362.

(a) *Stump v. Ayliffe*, Gwill. (b) Gwill. 857. 1240. 1347. 536. See Dy. 237. Cro. Eliz 853. (c) Supr. 164.

might apply it to prescription (*d*). But it seems that such exemption is not applicable to a composition real, or other particular title, without some specific evidence (*e*); yet although immemorial non-payment of any tithes from a district cannot raise a presumption of an exemption by grant from a lay rector, yet it is strong evidence to explain the extent of the grant of the rectory, if it be in any degree doubtful (*f*).

Payment of a composition for the tithes of turnips, whether pulled or eaten off the ground, where neither party considered it as an agistment tithe, was held to be no evidence of perception of that species of tithe (*g*).

Receipts for the payment of tithes not signed by the receiver of the tithes himself, but merely by his deputy, have been held to be inadmissible evidence (*b*): And where a modus of every tenth day's cheese for a certain period of the year, in lieu of tithe of milk, was insisted on; proof of the delivery of a cheese at the house of the tithe-gatherer, but not to himself, was not admitted as evidence to prove perception of the modus, for the tithe-gatherer's authority is personal; the act of any other person not authorized by the clergyman cannot bind his right (*i*).

Although on the trial of an issue directed by a court of equity respecting a modus, the evidence on the defendant's part proved a modus to extend to more clothes than were

(*d*) *Fryer v. Sims*, Gwill. 1356.

(*g*) Gwill. 1462.

(*e*) *Ibid.* and *vid Haywood v. Nicholls*, Gwill. 1120.

(*b*) *Yate v. Leigh*, Gwill. 861.

(*i*) *Wake v. Rufe*, Gwill.

(*f*) *Lord Petre v. Blencower*, 1396. 1. Anstr. 295. Gwill. 1484.

stated

stated in the pleadings, that was held not material, and the defendant had the benefit of the proof (i).

The testimony of persons, though not parties to the suit, yet if they are interested in the general question, shall be rejected; a rule of evidence, to which I have above alluded (k). Thus to prove an exemption from the payment of tithe wood within the weald of Kent, all those of whatever condition or reputation, who either as owners or farmers were entitled to any wood there, were held incompetent witnesses; for the custom being alleged to be general through the whole weald, though they were not parties to the suit, yet, inasmuch as the custom concerned them in their private profit, they were *quasi parties*, and their testimony *quasi in propriâ causâ* (l). On the same principle, in the case of a modus claimed for a whole vill, all those within the vill, as parties in interest, though not to the action, have been held inadmissible (m). The custom of tithing in other parishes than that in question cannot be given in evidence (n). Whether evidence of a general right can be applied in support of an allegation of a partial right seems doubtful; as where the plaintiff, in a bill for tithes in kind, alleged his title as vicar of the parish, and as such entitled by endowment, prescription, usage, or otherwise to the tithes in question in the townships of G. S. and L. S. and the tithable places thereof: In support of this allegation, proof was offered of the payment of tithe hay in all other parts of the parish; namely, in kind, where no tilth penny, and a tilth penny,

(i) Taylor v. Waller, Gwill. Denton, Gwill. 360.

699. Bunb. 267.

(m) Ibid.

(k) Supr. 149.

(n) Erskine v. Ruffle, Gwill.

(l) Earl of Clanrickard v. Lady 961.

where

where none in kind: But it was objected that this proof was not admissible in support of this allegation, for that, it was evidence of a general right throughout the parish; whereas the allegation was of a different right; that is, a portion of the tithes in the townships named, and that the defendants might by such means be misled into a defence against a title very different from the title alleged by the plaintiff: But the court, without disposing of this objection, gave judgment in favour of the plaintiff, there being other evidence in the cause sufficient to support his claim (o).

IV. In respect to the costs of suits for tithes, it is a settled rule, that in a bill of experiment, if the plaintiff fail, he shall pay costs (p). So, if the plaintiff file two bills against two persons, where the question might have been decided upon one bill, and does not succeed, both bills shall be dismissed with costs (q).

If to a bill for tithes, the defendant in his answer insist upon a tender before the commencement of the suit, if, on the cause proceeding to a hearing, the defendant is unable to surcharge the complainant, the court will decree the defendant to pay the sum tendered, and dismiss the bill with costs (r).

But, if the sum due exceed the sum tendered, the costs shall be paid by the defendant (s).

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| (o) Travis v. Chaloner, Gwill. | 1123. |
| 1237. | (r) Hawkins v. Harkness, |
| (p) Fryer v. Sims, Gwill. 1356. | Gwill. 868. |
| vid. Strutt v. Baker, <i>ibid.</i> 1430. | (s) Worral v. Nichols, Gwill. |
| 2 Vef. jun. 625. | 1302. |
| (q) Calcy v. Williamson, Gwill. | |

In a case in which the defendant tendered five pounds to the plaintiff, desiring him to take his tithes out of the money, the court declared this to be no good tender (*t*). Where the plaintiff submitted to a demurrer, and then amended his bill, but, before the amendment, the defendant tendered the tithes, the court decreed the money tendered, but made the plaintiff pay the costs of suit (*u*). On a bill for tithes, the defendant having answered, and admitted the plaintiff's right to tithes, and stated what he alleges to be due from him, may move, as of course, that the plaintiff may accept what is so due, with costs to that time, or proceed at the peril of costs; the motion does not require notice, the answer is sufficient to support it, but the order, when made, must be served (*v*): But a defendant cannot make *such* motion till the answer be filed, for till the answer and discovery be made upon it, the defendant has no means of knowing whether the sum tendered be the whole, or not, nor whether he ought to accept the money paid in (*w*). If the defendant admit the right to some part of the tithes claimed, and resist the demand for another part, he will not be permitted to pay into court the value of what he admits, unless on the payment of the whole costs then incurred (*x*).

As to part of a demand for tithes, the defendant by his answer tendered ten pounds, with costs to the time of the answer; at the hearing, the court decreed a trial at law as to the other part, and reserved further directions: after the trial, the court dismissed the whole bill, except as to

- (*t*) *Drake v. Brooking*, Gwill. 1422. See Gwill. 618 and 626.
 594. *vid. Rumney v. Willis*, *Ibid.* (*w*) *Hull v. Matthews*, Gwill.
 775. 1422. 2 *Anst.* 444.
 (*u*) *Henning v. Willis*, Gwill. (*x*) *Worrall v. Miller*, Gwill.
 899. 1436. 3 *Anst.* 632.
 • (*v*) *Parker v. Turner*, Gwill.

the

the ten pounds, which they decreed the defendant to pay with costs to the time of the answer inclusive, and no farther; and that from the time of the tender, the plaintiff should pay to the defendant the subsequent costs of suit; which subsequent costs were to be allowed to, and deducted by, the defendant out of the costs which should be taxed and allowed the plaintiff, so far as the same would extend, and the residue of the defendant's costs were to be paid by the plaintiff (y).

On a bill, to establish a modus, if the defendant decline an issue, the modus shall be established, and the plaintiff shall pay the defendant the costs of the suit. And as to modusses, which are tried on issues, and found against the parson, they shall be established without costs (z); the suit in equity is merely for the security of the plaintiff, and to prevent any farther impeachment of his right to an exemption of payment of tithes in specie, and is analogous to the case of a bill brought to perpetuate the testimony of witnesses, in which costs are never given against the defendant; but, in case the modus be established, the defendant shall pay costs to the plaintiff in respect to the proceedings at law (a).

The defendant having insisted on a modus in his answer, moved for leave to pay up the arrears of the modus, with costs of the suit up to that time, and the plaintiff to proceed farther at his peril; the application was refused on the ground that such a tender is never allowed, except where the defendant offers to pay the thing demanded;

(y) *Mason v. Watson*, Gwill. 611. *ston*, Ibid. 1048. *Berners v. Hillet*, Ibid. 871.

(z) *Anderton v. Davies*, Gwill. 1268. See also *Cleaves v. Kny-*

(a) *Clifton v. Orchard*, Gwill. 746. 1 Atk. 610.

that is, the value of the tithes themselves, and not where he tenders a less sum to make good the bar he sets up against the demand. The court, however, then said, that they would consider the offer afterwards in the costs, if the plaintiff should proceed. He did proceed; had an issue directed, and abandoned it. The modus was therefore taken *pro confesso*, and the costs to the time of the former offer were directed to be paid by the defendant, since that time by the plaintiff, without opposition (b).

V. A summary method of recovering small tithes, under the value of forty shillings, is given by statute 7 and 8 Will. the third, c. 6. by complaint to two justices of the peace: And by another statute of the same year, the same remedy is extended to all tithes withheld by quakers under the value of ten pounds.

By the former of these statutes, 7 and 8 Will. third, c. 6.^x (§ 1.) all persons are enjoined to set out and pay their small tithes, and compositions, and agreements for the same, with all offerings to the rectors, vicars, and other persons to whom they are due, according to the rights, customs, and prescriptions commonly used within the respective parishes; and where such tithes, offerings, or compositions do not amount to above the yearly value of forty shillings from any person, then, if he shall subtract or withdraw, or any way fail in the true payment of them by the space of twenty days, at most, after demand thereof, the person to whom they shall be due may make his complaint in writing to two or more justices of the peace within the county or place where the same shall grow due, neither of whom shall be the patron of the church or

(b) Dean and Chapter of Brif. 1 Anstr. 272;
tel v Donnesthorpe, Gwill. 1396.

^x The provisions of these statutes have been extended by 53 Geo 3 c. 127 chapel

chapel whence the tithes arise, nor any way interested in such tithes, offerings, or composition; and it is (§ 2.) further enacted, that the justices on such complaint shall summon by reasonable warning under their hands and seals, every person against whom any such complaint shall be made; and after his appearance or default, the summons being proved on oath before the justices, they, or any two or more of them, shall proceed to hear and determine, and shall, upon sufficient proof, in writing, under their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes, offerings, and composition, as they shall judge to be reasonable, and also such costs and charges not exceeding ten shillings, as upon the merits of the cause shall appear just; (§ 3) and if any person shall refuse or neglect, by the space of ten days after notice given, to pay the money adjudged, the constables and church-wardens of the parish, or one of them, shall, by warrant under the hands and seals of the justices, distrain his goods and chattels, and after detaining them by the space of three days, in case the sum adjudged with reasonable charges of the distress, be not tendered or paid by the party, shall make public sale of the goods distrained, and pay to the party complaining the sum so adjudged, retaining to themselves such reasonable charges of distress as the justices shall think fit, and (§ 4.) rendering the overplus, if any, to the owner; and the (§ 6.) justices are expressly empowered to administer oaths to the witnesses: But no such complaint shall be heard and determined by the justices, which shall not be made within two years next after the time when the tithes, offerings, and compositions become due (§ 7.), and an appeal is thereby given to the next general quarter-sessions; and on the judgment being confirmed, the justices are to give reasonable costs against the appellant, to be levied by distress, and no proceedings or judgment, had by virtue

of that act, shall be removed by writ of *certiorari*, unless the title to such tithes and offerings shall be in question; (§ 9) and every person obtaining judgment, or against whom judgment shall be obtained by virtue of that act, shall procure it to be inrolled at the next general quarter-sessions for the county or place; and the clerk of the peace is required, upon tender thereof, to inrol the same, the fee not to exceed one shilling; and the judgment so inrolled, and satisfaction made by paying the sum adjudged, shall be a good bar against the rectors, vicars, and other persons, from any other remedy for such small tithes, offerings, or compositions, for which such judgment was obtained; (§ 12.) and the justices may give costs not exceeding ten shillings to the party prosecuted, if they shall find the complaint to be false and vexatious, to be levied in the manner before described; (§ 14.) and it is thereby provided, that any clerk, or other person, who shall begin any suit for recovery of small tithes, or offerings, not exceeding the value of forty shillings, in the exchequer, or in any of the ecclesiastical courts, shall have no benefit by that act for the matter for which he shall have so sued; (§ 5.) and that the act shall not extend to the city of London, nor to any other city or town corporate where such tithes or offerings are settled by any act of parliament in that case particularly made; and that where any person, against whom such complaint shall be made, shall before the justices insist on any prescription, composition, or modus *decimandi*, agreement or title, by which he ought to be freed from the payment of such tithes, or other dues in question, and deliver the same in writing to the justices subscribed by him, and shall give to the party complaining security to the satisfaction of the justices, to pay all such costs and damages as upon a trial at law shall be given against him, in case such prescription, composition, or modus *decimandi*,

shall not upon such trial be allowed, then that the justices shall forbear to give judgment in the matter, and the complainant may prosecute his complaint in any other court where he might have sued before the making of that act. (§ 8.)

By the statute 7 and 8 Wm. third, c. 34. secondly above mentioned, it is enacted, that where any quaker shall refuse to pay, or compound for his great or small tithes, or to pay church rates, the two next justices of the peace of the same county, other than such justice as is the patron of the church, or interested in the tithes, may on complaint of any parson, vicar, farmer, or proprietor of tithes, or churchwarden who ought have or collect the same, by warrant under their hands and seals, convene such quaker and examine by oath, or otherwise, the truth of the complaint, and ascertain the sum due, and by order under their hands and seals direct the payment thereof, provided the sum ordered do not exceed ten pounds, and on refusal of payment any one of such justices may by warrant under his hand and seal levy the money by distress and sale, rendering the surplus, deducting the charges of distraining; and an appeal is thereby given to the next general quarter sessions from such judgment, with power of giving costs to be levied by distress and sale; and the judgment shall not be removed or superseded by writ of *certiorari*, or other writ, unless the title shall be in question; provided that in case of such appeal no warrant of distress shall be granted till the appeal be determined.

These statutes relate only to tithes, and church rates, and were merely temporary. But by statute 1 Geo. first, stat. 2. c. 6. they are made perpetual, and extended to any tithes or rates, or any customary or other rights, dues, or payments belonging to any church or chapel,

which of right by law and custom ought to be paid for the stipend or maintenance of any minister, or curate officiating in any church or chapel, and the act directs, that the proceedings shall not be removed into any other court, unless the title shall be in question.

The writ of *certiorari* having issued to remove an order of justices made against a quaker, under the above mentioned statute 1 Geo. 1. stat. 2, granted on a positive, but general affidavit, that the defendant controverted the title to the tithes before the justices, and that the title to them was really in question, the writ was superseded—*quia improvidè emanavit*; the return taken off the file, and the order remanded, upon its appearing that this allegation and assertion had no other foundation than the general scruples of the defendant to pay demands of this nature; the court holding that the act was made in favour to, and for the ease and benefit of quakers, and to save them from troublesome and expensive prosecutions; but that it never meant that a mere scruple of theirs, or an obstinate withholding of the tithes should be any hindrance to the matter being determined by the justices of the peace. This would have frustrated the very intention of the act, which meant to give this jurisdiction to justices in that very case, where the legal right and title to them should not be in dispute between the parties (c).

Lastly, in regard to the remedies for the recovery of tithes in London; they are not restricted to such as are afforded by the decree and stat. of Henry the eighth.

It is clearly settled, that the particular jurisdiction created by the decree and statute, has not deprived courts of equity of the ancient jurisdiction, which they exercised

(c) The King v. Wakefield, Gwill. 864. Burr. Rep. 485.

on this subject; therefore suits for tithes in London may still be sustained in the courts of chancery, and the exchequer: This point is established by a long train of authorities, and upon a very sound principle; an act of parliament creating a special jurisdiction never ousts the jurisdiction of Westminster-hall without a special provision to that effect; there is no vestige of an authority to the contrary; the lord mayor is incapable of exercising a jurisdiction with regard to fraudulent leases. Before the statute of Henry the eighth, tithes in London stood upon the same footing as other matters of ecclesiastical cognizance; but antecedently to that statute courts of equity possessed jurisdiction on the subject, and very beneficially, because the spiritual court in many instances is incapable of applying an effectual remedy; if accounts are necessary, recourse must be had to equity; or in cases of fraud, if the prosecution of the right depend on matters of discovery (*d*).

It moreover appears, that the decree and statute just referred to has not deprived the ecclesiastical court of its jurisdiction with respect to tithes in the city of London; for, though in the case of *Skidmore and Eire* above cited, one point resolved was, that a parson of a parish in London could not sue for the tithes in the ecclesiastical court; for that the act and decree, that raised and gave this kind of tithes, did limit and appoint how, and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same; and in that case it was awarded, that the prohibition should stand (*e*); yet lord Loughborough C. in the course of his argument, in the case of the warden and minor canons of St. Paul's, ex-

(*d*) The warden and minor canons of St. Paul v. Cricket, Gwill. authorities there cited.
 1425. 2 Vef. jun. 563. and the 660. (*e*) *Skidmore v. Eire*, 2 Inst.

which of right by law and custom ought to be paid for the stipend or maintenance of any minister, or curate officiating in any church or chapel, and the act directs, that the proceedings shall not be removed into any other court, unless the title shall be in question.

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(*d*) The warden and minor canons of St. Paul v. Cricket, Gwill. (*e*) *Skidmore v. Eire*, 2 Inst. 1425. 2 Vcf. jun. 563. and the 660.

pressed his opinion that the case of Skidmore and Eire was an unhandsome struggle for jurisdiction, and that the prohibition was carried farther than in just reason it ought. But his lordship at the same time observed, that he could scarcely figure a case in which the ecclesiastical court would be able to execute its own jurisdiction, for it must run into customary payments (f).

By the statute 22 and 23 Car. second, c. 15. passed for the better maintenance of the clergy of London in the parishes burnt by the fire, the sums of money which have been duly according to the directions of the act, assessed upon the several houses, and other buildings within the parishes mentioned in the act, are become fixed and *real* charges upon the houses, and buildings, on which they were so assessed, so that the arrears, which ought to have been paid by the former occupiers, or which became due when the houses stood empty, may be levied by distress and sale of the goods of the present occupiers (g).

If the lord mayor do wrong in refusing his warrant of distress for levying sums of money on the inhabitants who deny the minister his assessment made in the year 1681, under the aforesaid act of parliament of 22 and 23 Car. second, the court of chancery, upon petition, has jurisdiction to issue its warrant for levying the sums assessed (b).

For the stipends of the ministers of the fifty new churches provision is made by several acts of parliament, to be raised from the duties on coals.

There are, moreover, several particular statutes relative to particular churches in London and other places.

(f) The warden and minor canons of St. Paul's v. Cricket, Gwill. 1725. 2 Vef. jun. 563.

(g) *Ex parte Croxall*, Gwill. 812. 3 Atk. 69.

(b) *Ibid.*

APPENDIX.

No. I.

A CATALOGUE of MONASTERIES of the yearly Value of Two Hundred Pounds, or upwards, dissolved by the Statute of 31 Hen. Eighth, and by such Means capable of being discharged of Tithes. In which are the following Abbreviations: A. Abbey; P. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks, Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacks; Cist. Cistercians; N. Nuns; T. in the Time of; ab. about the Year. The Catalogue is extracted from Tanner's *Notitia Monastica*.

BEDFORDSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Elstow olim Helenestow, Elnstow, Or Alnc- stowe A. }	Ben.	T.W.Conqr.	284	12	11½
Dunstable P. -	C. Aust.	T.H.I.	344	13	3½
Wardon A. -	Cist.	1135	389	16	6½
Chickland P. -	Gilb.	ab. 1150.	212	3	5½
Newenham P. -	C. Aust.	T.H.L.	293	5	11
Woburn A. -	Cist.	1145	391	18	7½

BERKS.

Abingdon A. -	Ben.	ab. 670	1876	10	9
Bulterham; or Bysham- Montague A. - }	C. Aust.	13 E. III.	285	1	
Reading A. -	Ben.	T.H.I.	1938		

GLOUCESTERSHIRE continued.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Lantony near Gloucester, or Lantonia Secunda.	C. Aust.	1136	648	19	11½
Hayles, or Tray A.	Cist.	1246	357	7	8½

HAMPSHIRE.

Winchester St Swithin's P.	Ben.	ab. 646	1517	7	2½
Hyde, or Newminster A.	Ben.	901	865	18	0½
Rumefey A.	Ben N.	967	393	10	10½
Wherwell A.	Ben N.	986	339	7	7
Twinham, or Christchurch P.	C. Aust.	ab. 1150	312	7	0½
Southwyke, or Portchester P.	C. Aust.	1133	257	4	4½
Beaulieu A.	Cist.	1204	326	13	2½
Tychfield A.	Præm.	1231	249	16	3

HEREFORDSHIRE.

Wigmore A.	C. Aust.	T. H. I.	267	2	10½
Leominster, or Lemster, olim Leonis Monaste- rium, Leof, or Llanli- ensis, Cell.	Ben.	bef. 1125	212	12	0

HERTFORDSHIRE.

St. Alban's A.	Ben.	793	2102	7	1½
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HUNTINGDONSHIRE.

St. Neot's, olim Eynulfes- bury, or Henulfesberi P.	Ben.	T. H. I.	241	11	4½
Ramsey A.	Ben.	969	1715	12	3

KENT.

Canterbury Christ-church P.	Ben.	ab. 600	2349	8	5½
Canterbury St. Augu- stine's A.	Ben.	ab. 605	1413	4	11½
Leedes P.	C. Aust.	1119	362	7	7
Boxley A.	Cist.	1146	204	4	11
Feverham A.	Ben.	1147	286	12	6½
Dertford P.	Aust. N.	ab. 1355	380	9	0½
Rocheſter P.	Ben.	ab. 600	486	11	5
Malling A.	Ben. N.	T. W. Rufus	218	4	2½

-LAN-

APPENDIX.

297

LANCASHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Furnes A.	Cist.	1124	805	16	5
Whalley A.	Cist.	1172	321	9	1½

LEICESTERSHIRE.

Leicester St. Mary A.	C. Aust.	1143	951	14	5½
Landa, Launde, or Loddington P.	C. Aust.	T.H.I.	399	3	3½
Croxton, or De Valle in Croxton A.	Præm.	1162	385	0	10½

LINCOLNSHIRE.

Bardney, olim Beardanam A.	Ben.	T. Ethelred	366	6	1
Crowland A.	Ben.	716	1083	15	10½
Spalding A.	Ben.	1052	767	7	11
Sempringham P.	Gilb.	ab. 1139	317	4	1
Kirkstede A.	Cist.	1139	286	2	7½
Thorneton upon the Hamber, or Thornton Curteis, olim Torington A.	C. Aust.	1139	594	17	5½
Revesby A.	Cist.	1142	287	2	4½
Lincoln St. Catherine P.	Gilb.	1148	202	5	0½
Barlings, or Oxeney A.	Præm.	1154	252	5	11½
The Priory in the Wood, or the House of the Visitation of the Blessed Virgin, near Eppworth, in the Isle of Axholm	Carth.	ab. 19 R. II.	237	15	2½

LONDON and MIDDLESEX.

St. John of Jerusalem, or St. Jones	—	1100	2385	19	11
St. Bartholomew's P.	C. Aust.	1123	693	0	10½
Clerkenwell, or St. Mary's de Fonte Clericorum P.	Ben. N.	ab. 1100	262	19	0
Haliwell P.	Ben. N.	before 1127	300	19	5
St. Helen's P.	Ben. N.	ab. 1210	320	15	8½
Chartreuse House P.	—	ab. 1360	642	0	4½
The Minorities	—	1293	318	8	5
Eastminster New Abbey, or St. Mary of Graces,	Cist.	1349-50	547	0	6½

LON.

LONDON and MIDDLESEX continued.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Westminster, olim Thorneic A. - }	Ben.	ab. 610	3470	0	2½
Syon A. -	Brig. N.	1414	1731	8	9½

NORFOLK.

St. Bennet's of Hulme A.	Ben.	ab. 1800	583	17	0½
Walsingham P. -	C. Auf.	T.W. Conq.	391	11	7½
Thetford P. -	Clun.	ab. 1104	312	4	4
Castleacre, or Estacre P.	Clun.	ab. 1085	306	11	4½
Norwich P. -	Ben.	1100	874	14	6½
Westacre, olim Acra P.	C. Auf.	T.W. Rufus	260	13	7½
Wymondham, or Windham A. - }	Ben.	before 1107	211	16	6½
West Dereham A. -	Præm.	1188	228	0	0½

NORTHAMPTONSHIRE.

Peterborough, olim Medeshamsted A. - }	Ben.	ab. 655	1721	14	0½
Northampton St. Andrew's	Clun.	1076	263	7	1½
Pipewell, olim S. Mariæ de Divisis - }	Cist.	1143	286	11	8½
Sulby, or Welleford A.	Præm.	ab. 1155	285	8	5

NORTHUMBERLAND.

Tinmouth, olim Duncmuth, or Dounemad Cell. - }	Ben.	T.St. Oswald	397	10	5½
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NOTTINGHAMSHIRE.

Wirkelop, or Radford P.	C. Auf.	T. H. I.	239	15	5
Lenton P. -	Clun.	T. H. I.	387	10	10½
Thurgarton P. -	C. Auf.	ab. 1130	359	9	4½
Welbeck A. -	Præm.	1152	249	6	3

OXFORDSHIRE.

Egnesham, or Eynsham A.	Ben.	before 1005	441	12	2½
Tame A. -	Cist.	ab. 1137	256	14	7½
Godestow A. -	Ben. N.	1138	258	10	6½

OX-

OXFORDSHIRE continued.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Osney A. - -	C. Aust.	1129	654	10	2½
Dorchester, olim Dorcia A.	C. Aust.	1140	217	5	9½

SHROPSHIRE.

Wenlock, olim Winnicas A.	Clun.	14 W. Conq.	401	7	0½
Shrewsbury A. -	Ben.	1083	532	4	10
Haghamon A. -	C. Aust.	1110	259	13	7½
Lilleshall, near Duninton A.	C. Aust.	ab. 1145	229	3	1½
Hales, or Halesfoweyne A.	Præm.	T. John	280	13	2½

SOMERSETSHIRE.

Glastonbury, olim Avalonia A. -	} Ben.	—	3311	7	4½
Bath A. -					
Athelney, olim Ethelindra A. -	} Ben.	ab. 888	209	0	3½
Michelney, or Muchenay A.					
Bruton, Brewetone, or Briwedon A. -	} C. Aust.	ab. 1005	439	6	8
Montacute P. -					
Taunton P. -	Clun.	{ T.W.Co. } or H. I.	456	14	3½
Keynsham A. -	C. Aust.	T. H. I.	286	8	10
Minchin Buckland P.	C. Aust.	ab. 1170	419	10	4½
Witham P. -	Aust. N.	T. H. II.	223	7	4½
Henton P. Atrium Dei, or Locus Dei -	Carth.	T. H. II.	215	15	0
		1227	248	19	2

BRISTOL.

Great St. Augustine's P.	C. Aust.	1148	670	13	11½
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STAFFORDSHIRE.

Burton A. -	Ben.	1004	267	14	3
Dieulacres A. -	Cist.	1214	227	5	0

SUFFOLK.

Bury St. Edmund, olim Bederiefworthe, or Eadmundestow A. -	} Ben.	1020	1655	7	3
Sibton A. - -					
Butley P. -	Cist.	1149	250	15	7½
	C. Aust.	1171	318	17	2½

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which of right by law and custom ought to be paid for the stipend or maintenance of any minister, or curate officiating in any church or chapel, and the act directs, that the proceedings shall not be removed into any other court, unless the title shall be in question.

The writ of *certiorari* having issued to remove an order of justices made against a quaker, under the above mentioned statute 1 Geo. 1. stat. 2, granted on a positive, but general affidavit, that the defendant controverted the title to the tithes before the justices, and that the title to them was really in question, the writ was superseded—*quia improvide emanavit*; the return taken off the file, and the order remanded, upon its appearing that this allegation and assertion had no other foundation than the general scruples of the defendant to pay demands of this nature, the court holding that the act was made in favour to, and for the ease and benefit of quakers, and to save them from troublesome and expensive prosecutions; but that it never meant that a mere scruple of theirs, or an obstinate withholding of the tithes should be any hindrance to the matter being determined by the justices of the peace. This would have frustrated the very intention of the act, which meant to give this jurisdiction to justices in that very case, where the legal right and title to them should not be in dispute between the parties (c).

Lastly, in regard to the remedies for the recovery of tithes in London; they are not restricted to such as are afforded by the decree and stat. of Henry the eighth.

It is clearly settled, that the particular jurisdiction created by the decree and statute, has not deprived courts of equity of the ancient jurisdiction, which they exercised

(c) The King v. Wakefield, Gwill. 864. Burr. Rep. 485.

on this subject; therefore suits for tithes in London may still be sustained in the courts of chancery, and the exchequer: This point is established by a long train of authorities, and upon a very sound principle; an act of parliament creating a special jurisdiction never ousts the jurisdiction of Westminster-hall without a special provision to that effect; there is no vestige of an authority to the contrary; the lord mayor is incapable of exercising a jurisdiction with regard to fraudulent leases. Before the statute of Henry the eighth, tithes in London stood upon the same footing as other matters of ecclesiastical cognizance; but antecedently to that statute courts of equity possessed jurisdiction on the subject, and very beneficially, because the spiritual court in many instances is incapable of applying an effectual remedy; if accounts are necessary, recourse must be had to equity; or in cases of fraud, if the prosecution of the right depend on matters of discovery (*d*).

It moreover appears, that the decree and statute just referred to has not deprived the ecclesiastical court of its jurisdiction with respect to tithes in the city of London; for, though in the case of *Skidmore and Eire* above cited, one point resolved was, that a parson of a parish in London could not sue for the tithes in the ecclesiastical court; for that the act and decree, that raised and gave this kind of tithes, did limit and appoint how, and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same; and in that case it was awarded, that the prohibition should stand (*e*); yet lord Loughborough C. in the course of his argument, in the case of the warden and minor canons of St. Paul's, ex-

(*d*) The warden and minor canons of St. Paul v. Cricket, Gwill. 1425. 2 Vc. jun. 563. and the authorities there cited. (*e*) *Skidmore v. Eire*, 2 Inst. 660.

No. II.

1. Of the parish of *Albhallows, Lumbarb-street*, one hundred and ten pounds, cx l.
2. Of St. *Bartholomew Exchange*, one hundred pounds c l.
3. Of St. *Bridget*, alias *Brides*, one hundred and twenty pounds, cxx l.
4. Of St. *Bennet Finck*, one hundred pounds, c l.
5. Of St. *Michael Crooked lane*, one hundred-pounds, c l.
6. Of St. *Cbristopher*, one hundred and twenty pounds, cxx l.
7. Of St. *Dionis Backburch*, one hundred and twenty pounds, cxx l.
8. Of St. *Dunstan* in the east, two hundred pounds, cc l.
9. Of St. *James Garlick Hythe*, one hundred pounds, c l.
10. Of St. *Michael Cornbill*, one hundred and forty pounds, cxl l.
11. Of St. *Michael Bassifbaw*, one hundred thirty and two pounds and eleven shillings, cxxxii l. xi s.
12. Of St. *Margaret Lotbbury*, one hundred pounds, c l.
13. Of St. *Mary Aldermanbury*, one hundred and fifty pounds, cl l.
14. Of St. *Martin Ludgate*, one hundred and fixty pounds, clx l.
15. Of St. *Peter Cornbill*, one hundred and ten pounds, cx l.
16. Of St. *Stephen Coleman-street*, one hundred and ten pounds, cx l.
17. Of St. *Sepulchre*, two hundred pounds, cc l.
18. Of *Albhallows Bread-street*, and St. *John Evangelist*, one hundred and forty pounds, cxl l.
19. Of *Albhallows the Great*, and *Albhallows the Less*, two hundred pounds, cc l.
20. Of St. *Alban Wood-street*, and St. *Olaves Silver-street*, one hundred and seventy pounds, clxx l.
21. Of St. *Anne* and *Agnes*, and St. *John Zachary*, one hundred and forty pounds, cxl l.
22. Of St. *Augustine*, and St. *Faith*, one hundred seventy and two pounds, clxxii l.
23. Of St. *Andrew Wardrobe*, and St. *Anne Blackfryers*, one hundred and forty pounds, cxl l.
24. Of St. *Antholin*, and St. *John Baptift*, one hundred and twenty pounds, cxx l.

25. Of

25. Of *St. Bennet Gracechurch*, and *St. Leonard Eastcheap*, one hundred and forty pounds, cxi l.
26. Of *St. Bennet Pauls-wharf*, and *St. Peters Pauls-wharf*, one hundred pounds, c l.
27. Of *Christ Church*, and *St. Leonard Foster-lane*, two hundred pounds, cc l.
28. Of *St. Edmund the King*, and *St. Nicholas Acons*, one hundred and eighty pounds, clxxx l.
29. Of *St. George Botolph-lane*, and *St. Botolph Billingsgate*, one hundred and eighty pounds, clxxx l.
30. Of *St. Lawrence Jewry*, and *St. Magdalen Milk-street*, one hundred and twenty pounds, cxx l.
31. Of *St. Magnus*, and *St. Margaret New Fish-street*, one hundred and seventy pounds, clxx l.
32. Of *St. Michael Royal*, and *St. Martin Vintry*, one hundred and forty pounds, cxl l.
33. Of *St. Matthew Friday-street*, and *St. Peter Cheap*, one hundred and fifty pounds, cl l.
34. Of *St. Margaret Patons*, and *St. Gabriel Fenchurch*, one hundred and twenty pounds, cxx l.
35. Of *St. Mary at Hill*, and *St. Andrew Hubbard*, two hundred pounds, cc l.
36. Of *St. Mary Woolnoth*, and *St. Mary Woolchurch*, one hundred and sixty pounds, clx l.
37. Of *St. Clement Eastcheap*, and *St. Martin Orgars*, one hundred and forty pounds, cxl l.
38. Of *St. Mary Abchurch*, and *St. Lawrence Pountney*, one hundred and twenty pounds, cxx l.
39. Of *St. Mary Aldermay*, and *St. Thomas Apostles*, one hundred and fifty pounds, cl l.
40. Of *St. Mary le Bow*, *St. Pancras Soper-lane*, and *Alkathews Honey-lane*, two hundred pounds, cc l.
41. Of *St. Mildred Poultry*, and *St. Mary Cole Church*, one hundred and seventy pounds, clxx l.
42. Of *St. Michael Wood-street*, and *St. Mary Staining*, one hundred pounds, c l.
43. Of *St. Mildred Bread-street*, and *St. Margaret Moses*, one hundred and thirty pounds, cxxx l.
44. Of *St. Michael Queenbyth*, and *Trinity*, one hundred and sixty pounds, clx l.
45. Of *St. Magdalen Old Fish-street*, and *St. Gregory*, one hundred and twenty pounds, cxx l.

46. Of St. *Mary Somerset*, and St. *Mary Mounthaw*, one hundred and ten pounds, cx l.

47. Of St. *Nicholas Cole Abby*, and St. *Nicholas Olaves*, one hundred and thirty pounds, cxxx l.

48. Of St. *Olave Jewry*, and St. *Martin Ironmonger-lane*, one hundred and twenty pounds, cxx l.

49. Of St. *Stephen Walbrook*, and St. *Bennet Sheerhogg*, one hundred pounds, c l.

50. Of St. *Swythyn*, and St. *Mary Bzthaw*, one hundred and forty pounds, cxl l.

51. Of St. *Vedaft*, alias *Fofsters*, and St. *Michael Quern*, one hundred and sixty pounds, clx l.

ADDENDA ET CORRIGENDA.

AFTER note (c.) pag. 124, insert “ But in a case in the court of exchequer, *Worrall v. Miller and Sweet*, 19 Dec. 1801, in which an impropriate rector filed his bill against nurserymen within the parish for the tithes in kind of all the produce of the nursery grounds, as well for young trees, ordinary fruits, and garden stuff, as for pines, grapes, and all exotics produced, or brought to perfection in hot-houses, and green-houses; and the defendants admitted his claim to tithes of all the productions of their nursery grounds, which they had offered to settle and account for; but denied it in regard to any productions forced, or preserved in buildings, (that is to say) pines and other exotics, which they admitted they cultivated in their houses; insisting that those articles were not tithable: the court decreed that so much of the bill as prayed an account of pine apples, grapes, and other exotics raised in hot-houses, and green-houses should be dismissed without costs; and that the rest of the bill should be dismissed with costs.

Page 80, after the third line, add the following words: “ However it has been recently held, that at common law, and without any custom, the hay must be partly made before the tithes are set out: That the parishioners cannot put the grass into cocks which are to be tithed immediately from the swathe: That they must first *tedd* it, that is, throw it abroad from the swathe, and afterwards gather it together again; then it being put into grass cocks, the tithe may be set out; after which the parson comes upon the ground, throws it abroad from the cock,

X

and

and completely makes it into hay. But it must first be *tedded* by the occupier of the soil. If in any particular case from the state of the crop, this process should not be required, that must be proved by the occupier (*)."

(*) *Newman v. Morgan*, per Heath J. *Campb. Ni. Pri. Ca.* 305. and afterwards confirmed by the opinion of the court of B. R.

Page

- 16.—7th line, for *seculars* read *executors*.
- 9th line, for *sow* read *sowed*.
- 10th line, for *dies* read *died*.
- 11th line, for *is* read *was*.
- 12th line, for *is* read *was*.
- 13th line, for *shall* read *should*.
- 22.—Last line but five, for *for* read *or*.
- 36.—Last line but four, for *unwilling* read *indisposed*.
- 41.—8th line, for *prædis* read *prædiis*.
- 47.—8th line, for *is* read *as*.
- 53.—14th line, dele *by*.
- 15th line, for *titbes* read *titles*.
- 69.—Last line but three, for *sheath* read *sheaf*.
- 95.—Last line but six, for *county* read *country*.
- 114.—18th line, for *judiciously* read *judicially*.
- 128.—1st line, for *parishes* read *parishioners*.
- 129.—8th line, dele *however*.
- 135. Note (q) for *Du Lange* read *Du Cange*.
- 148.—10th line, for *titbe* read *title*.
- 207.—To note (a) add *Gwill. 612. 626*.
- 210.—3d line, for *each* read *every hundred*.
- 9th line, for *penny* read *halfpenny*.
- 13th line, for *yeaned* read *weaned*.
- To note (v) add 654.

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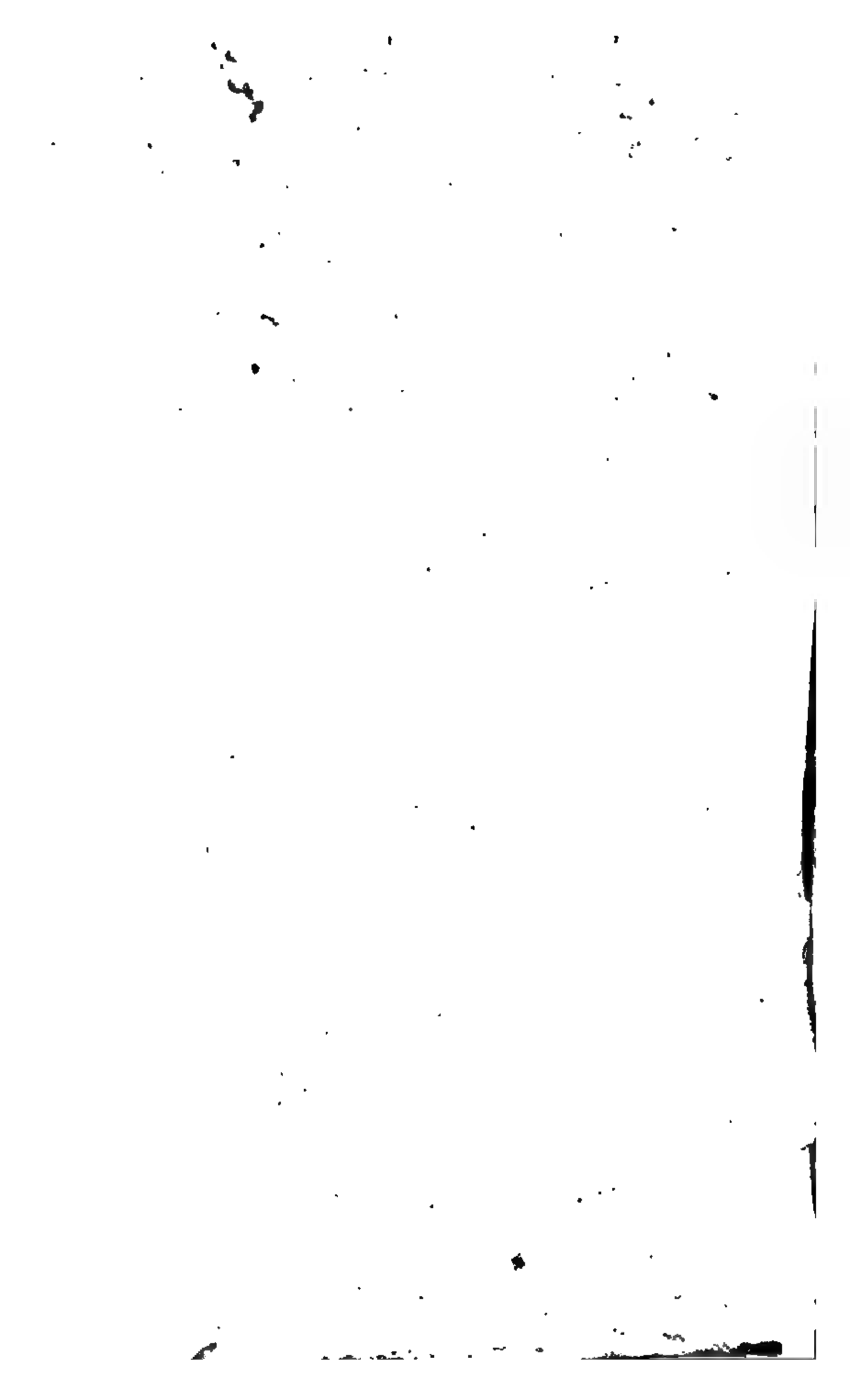
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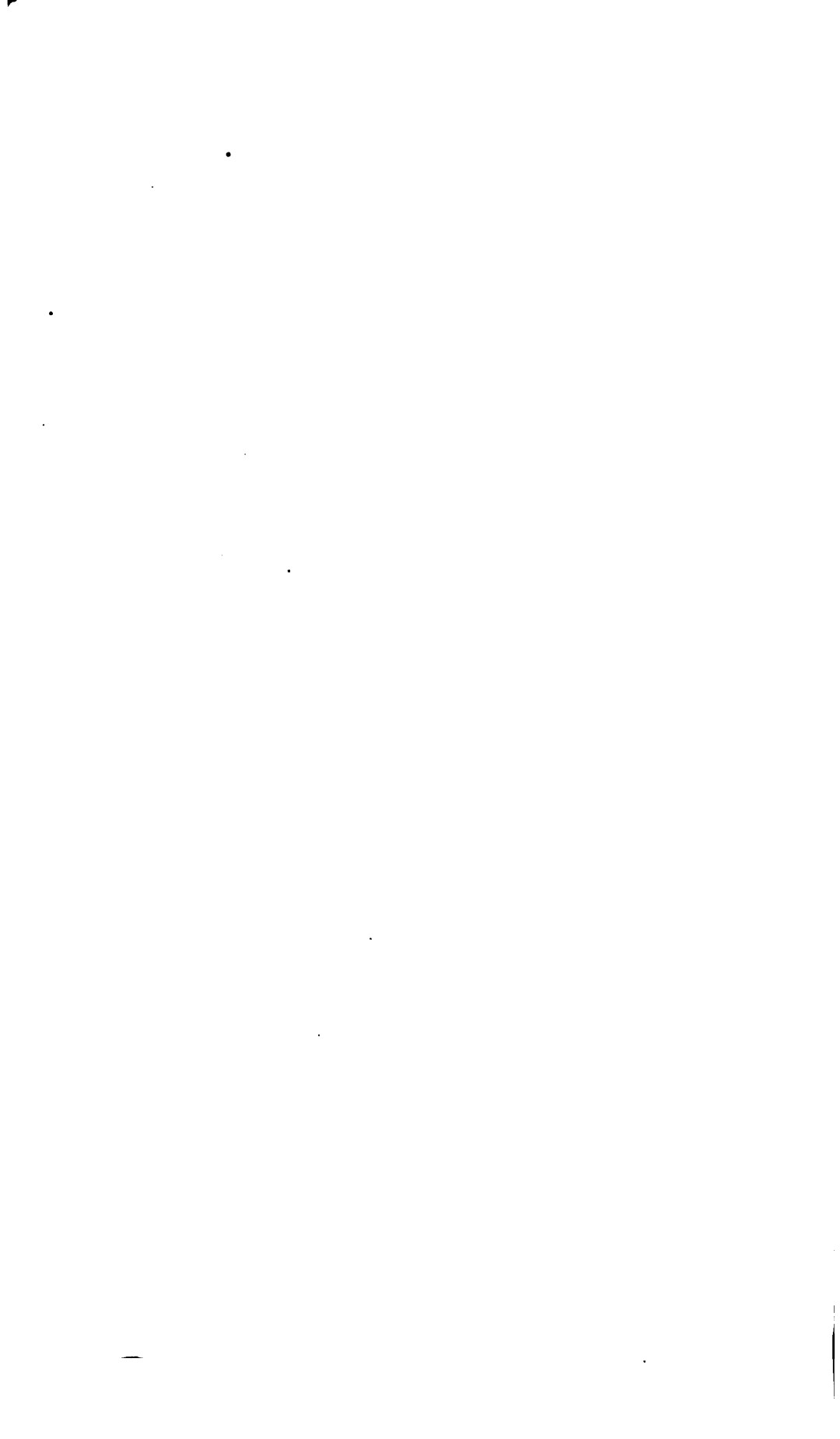
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